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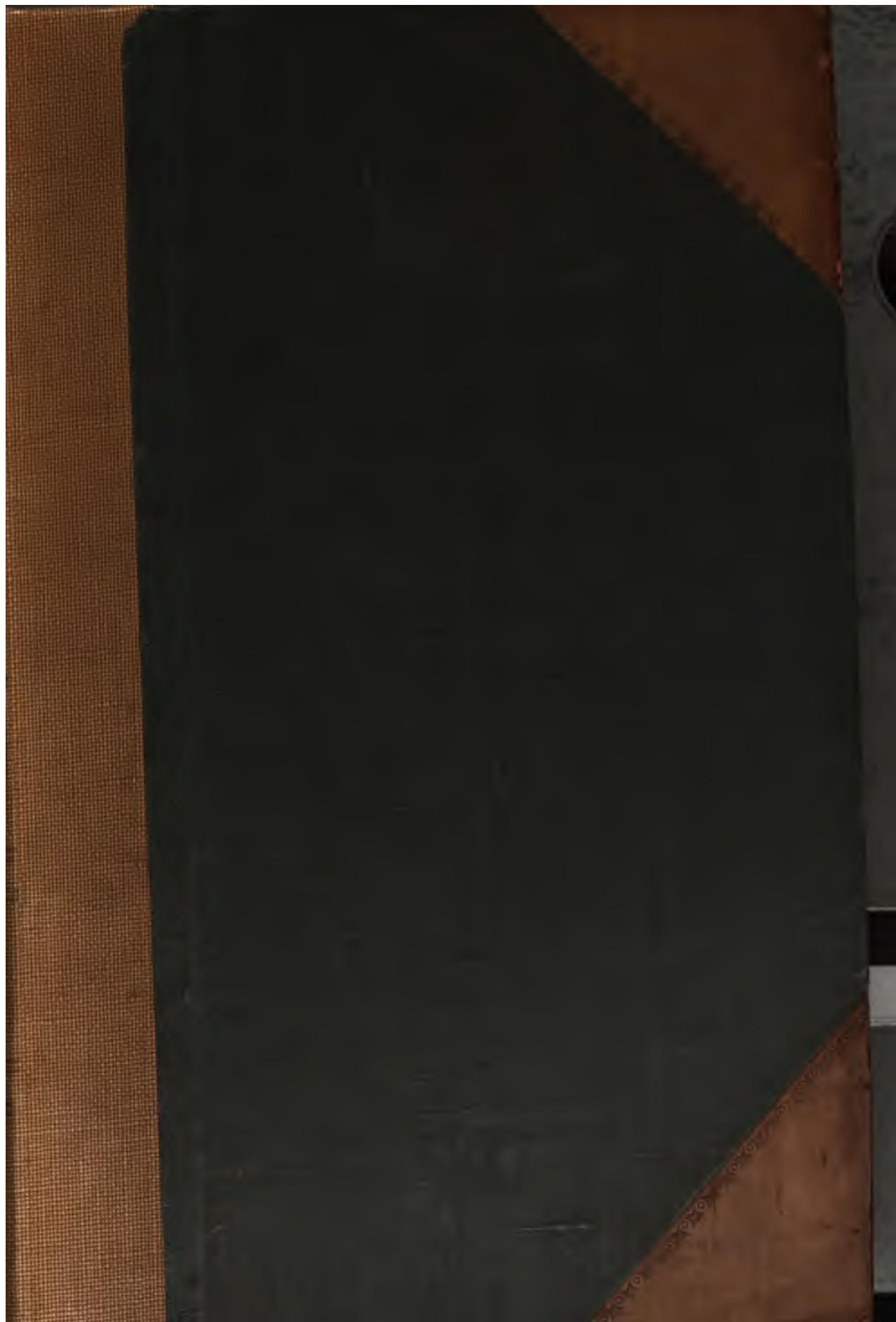
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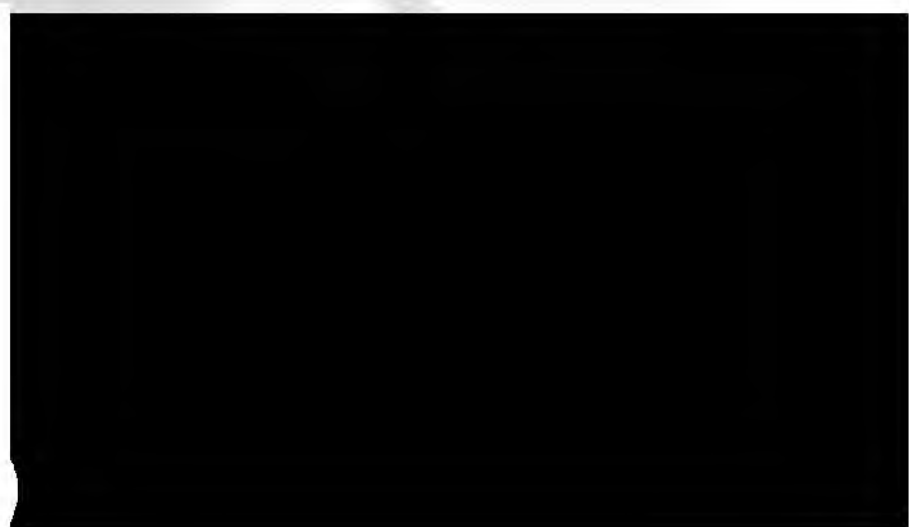
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R E P O R T S
OF
C A S E S
DECIDED **IN THE**
HOUSE OF LORDS,
ON
APPEALS AND WRITS OF ERROR,
AND CLAIMS OF PEERAGE,
DURING THE SESSIONS
1845 AND 1846.

By C. CLARK, Esq.,
AND
W. FINNELLY, Esq., M.A., } BARRISTERS AT LAW.

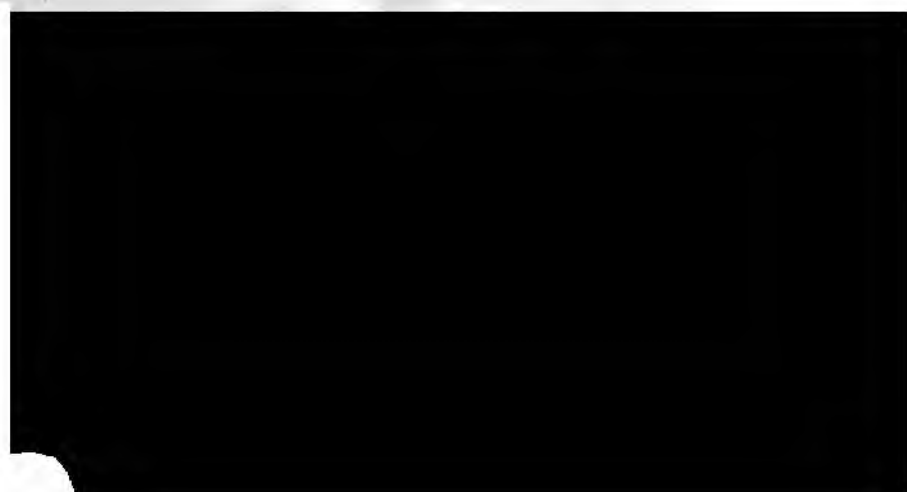
(BY APPOINTMENT OF THE HOUSE OF LORDS.)

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1847.





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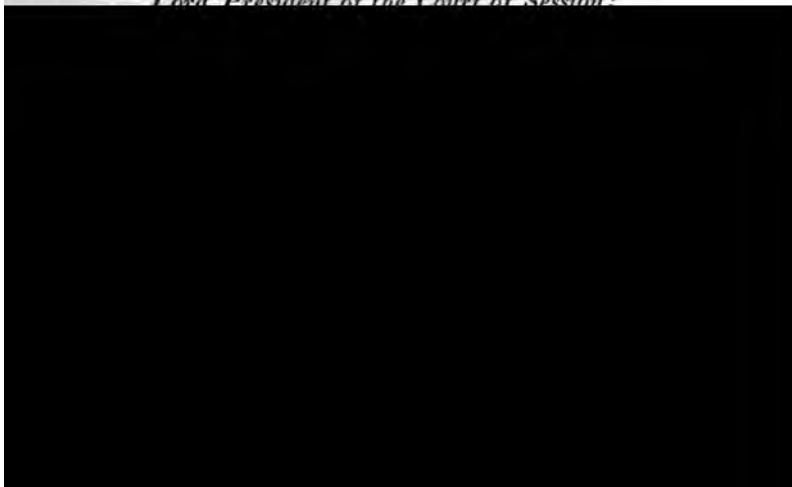
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Lord President of the Court of Session :



MEMORANDA.

Lord *Lyndhurst* having, in the first week in *July*, 1846, resigned the Great Seal, the same was delivered, for the second time, to Lord *Cottenham*.

Sir *Edward Sugden* having at the same time resigned the Great Seal of *Ireland*, the same was delivered to *Muziere Brady*, Esq., then Lord Chief Baron of the Court of Exchequer in *Ireland*, and *David R. Pigot*, Esq., Q. C., was appointed Lord Chief Baron.

Sir *F. Thesiger* resigned the office of Attorney General, and was succeeded therein by Sir *T. Wilde*. Sir *Fitzroy Kelly* resigned the office of Solicitor General, which was thereupon conferred upon *John Jervis*, Esq., one of her Majesty's Counsel.

Sir *N. C. Tindal*, Lord Chief Justice of the Court of Common Pleas, died on the 6th of *July*, 1846, and Sir *Thomas Wilde*, who held the office of Attorney-General, was appointed Lord Chief Justice.

Mr. *Jarvis* was then appointed Attorney General, and was shortly afterwards knighted. *David Dundas*, Esq., one of her Majesty's Counsel, was appointed Solicitor General.

Sir *John Williams*, Knt., one of the Judges of the Court of Queen's Bench, died on the 14th of *September* 1846, and Sir *William Erle*, one of the Judges of the Court of Common Pleas, was appointed to fill the vacancy thereby created; and, at the same time, *Edward Vaughan Williams*, Esq., was made a Judge of the Court of Common Pleas, and was afterwards knighted.

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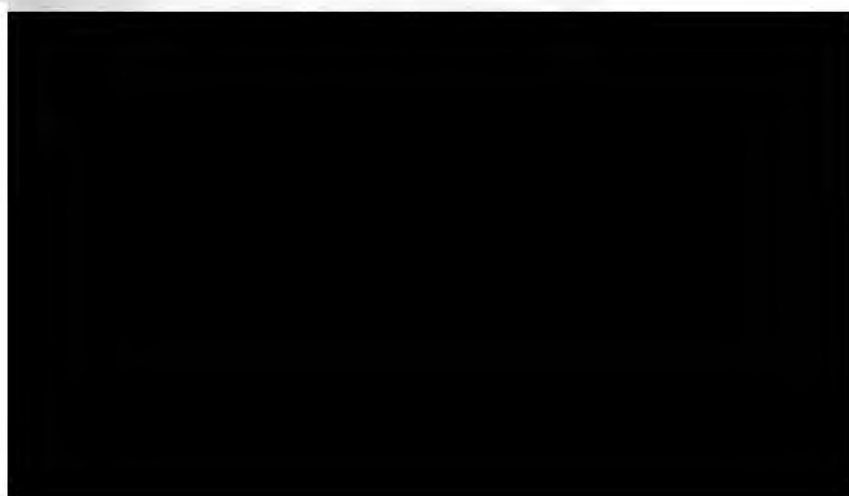


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ADDENDA.

49 Geo. III. c. 20, *Darley v. The Queen*, . 520
A private act of Parliament, passed for the purpose of enabling parties therein named to sell certain estates, and reciting the relationship of those parties, is receivable in evidence to prove that relationship. — *The Wharton Peerage*, 295.



REPORTS OF CASES

IN THE

HOUSE OF LORDS.

JOHN THOMSON	-	-	<i>Plaintiff in error.</i>	
HER MAJESTY'S ADVOCATE GENERAL			<i>Defendant in error.</i>	1842: July 12, 19. Aug. 4. 1845: Feb. 17, 18.

Personal property having no *situs* of its own, follows the domicile of its owner. *Legacy Duty.*
Domicile.

The law of the domicile of a testator or intestate decides whether his personal property is liable to legacy duty.

A British born subject, died, domiciled in a British Colony. At the time of his death he was possessed of personal property locally situate in Scotland. Probate of his will was taken out in Scotland, for the purpose of there administering this property: and out of the fund thus obtained by the executor, legacies were paid to legatees residing in Scotland:

Held, reversing a judgment of the Court of Exchequer in Scotland, that Legacy Duty was not payable in respect of these legacies.

JOHN GRANT, a British-born subject, and native of Scotland, made his will 1829, and died in 1837. At the time of his death he was domiciled in the British colony of Demerara, where the law of Holland was in force. There is not any local duty in the nature of legacy duty payable in that colony.

At the time of the death of *John Grant*, he was entitled to a large personal debt due to him in Scotland, which arose from money acquired by him whilst domiciled in

1845.
 {
 THOMSON
 v.
 The
 ADVOCATE
 GENERAL.

Demerara, and transmitted by him to Scotland for safe custody. After his death, *John Thomson* took out probate of his will, so far as related to the debt in Scotland, and there, from money arising from the said debt, paid in pursuance of the will, certain legacies, above the amount of twenty pounds, and paid over the rest as part of the residue of the personal estate of *John Grant*.

In July, 1840, an information in debt, setting forth these facts, was filed in the Court of Exchequer in Scotland by her Majesty's Advocate General against *John Thomson*, who appeared and put in a general demurrer, on the ground of insufficiency. Joinder in demurrer. The demurrer came on for argument upon the 29th January, 1841, before the Court of Exchequer in Scotland, and the only question raised was, whether the fact of the domicile of *Grant* in *Demerara*, prevented the legacy duty (under the 55 Geo. 3, c. 184, Schedule, part 3 (a)) from attaching on his personal property in Scotland. The Court of Exchequer took time to consider, and on 10th February following, overruled the demurrer, and gave judgment for the crown (b).

A writ of error was brought on this judgment. The case was argued in 1842, by Mr. *Pemberton* and Mr. *Anderson*, for the plaintiff in error; and by the Solicitor General (Sir *W. Follett*) and Mr. *Crompton*, for the defendant in error. It was then directed by their Lordships to be argued before the Judges by one counsel on a side. This argument did not take place till February, 1845, when the case was argued by Mr. *Kelly* (with whom was Mr. *Anderson*) for the plaintiff in error: and by the Solicitor General (Sir *F. Thesiger*, with whom was Mr. *Crompton*) for the defendant in error.

(a) Which declares that duty shall be payable "for every legacy, specific or pecuniary, or of any other description, of the amount of 20*l.* or upwards given by any will or testamentary instrument of any person out of his or her personal or moveable estate, or charged upon his or heritable estate," &c.

(b) 3 Dunl., Bell, Mur. & Dona., 1309.

Mr. *Pemberton* and Mr. *Anderson* for the plaintiff in error.—The question here is the same as if the party was an English subject, and the property had been transmitted from Demerara to England. That question is whether the legacy duty is payable in any case except where the party is domiciled in one part of the United Kingdom. It is now settled by this House that personal property has of itself no *situs*, that it must follow the domicile of the owner. That principle applies to this case, and defeats the claim of legacy duty. *The Attorney General v. Forbes*(*b*), and *Pipon v. Pipon*(*c*), are in point. When *Logan v. Fairlie* (*d*) was first decided, the great principle on which these cases depend was not understood. It is not true, as there stated, that administration must be taken out in England in order that the personal property in England of a testator domiciled abroad, should be administered here. [Lord *Campbell*.—In that case the principle of domicile was not applied.] It was not. That case was decided on the supposed authority of *The Attorney General v. Cockerell* (*e*), and *The Attorney General v. Beatson* (*f*). *Logan v. Fairlie*, was in substance reversed in the case of *Arnold v. Arnold* (*g*), by Lord Chancellor *Cottenham*. And *The Attorney General v. Cockerell* was distinctly reversed in *The Attorney General v. Forbes* (*h*). *In re Ewin*(*i*) was exactly the converse of this case. That case shews that if a party is domiciled in England, he pays legacy duty on personal property situated abroad. The domicile gives the law. The property there had not even been transmitted to this country, and yet the duty was held payable, because the party was domiciled here at the time of his death. That

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| (<i>b</i>) <i>Ante</i> , Vol. II., p. 48. | (<i>g</i>) 2 Mylne & Cr. 256. |
| (<i>c</i>) <i>Ambler</i> , 26. | (<i>h</i>) <i>Ante</i> Vol. II., p. 48; |
| (<i>d</i>) 2 Sim. & Stu. 284; 1 Myl. & Cr. 59. | nom. <i>Attorney General v. Jackson</i> , 8 Bli., N. S. 15. |
| (<i>e</i>) 1 Price, 165. | (<i>i</i>) 1 Cr. & Jer. 151; 1 Tyr. 92. |
| (<i>f</i>) 7 Price, 560. | |

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case clearly establishes that personal property for all purposes whatever follows the domicile of the owner. [*The Lord Chancellor*.—It was treated there precisely as if it was money in the different countries abroad. But the administrator had dealt with it in England.] Not quite so ; the case is still stronger, for he had taken measures for the very purpose of avoiding the payment of legacy duty, by not dealing with it, but transferring it by means of foreign powers of attorney. In the case of *In re Bruce (h)*, it was held that the property of an American citizen, situated in England, the testator dying abroad, was not liable to legacy duty. The only distinction between that case and the present is, that the party there was a foreigner : he having, upon the peace which followed the American Revolution, elected to be an American, and not a British subject. In all other respects that case is identical with the present. That difference alone does not affect the principle on which this case is to be decided. The next case is that of *Logan v. Fairlie (i)*, upon its second discussion. There it was argued that *Attorney General v. Forbes* had overruled the decision previously given in that case by the Vice Chancellor. On the other hand it was answered that the Lord Chancellor, in the House of Lords, had expressly declared that that case did not overrule any of the previous cases. But the Lords Commissioners, in deciding the case then before them

held not to be payable. [Lord *Campbell*.—It seems to be assumed there that an Englishman who holds in India a civil or military appointment, acquires thereby an Indian domicile. But has that been decided?] There has been no direct decision to that effect. The latest case is that of *The Attorney General v. Dunn*(*k*), and there legacy duty was held to be payable because circumstances did not shew that the deceased had obtained a foreign domicile; and his English domicile was therefore held to remain. The doubts there hinted at do not affect the decision. Then came *In re Coales*(*l*), and there the legacy duty was held to be payable because the testator was domiciled in England at the time of his death, and that domicile affected his foreign property.

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The question of domicile is that alone on which these cases depend; and it must be so, for personal property having of itself no *situs*, the moment you get the domicile of the party, you get the *situs* of the property. This case was expressly decided on the erroneous notion that the principle that personal property has no *situs* of its own was not applicable. The duty must be payable according to the law which regulates the succession of the property. The law of succession of personal property is that of the domicile of the party leaving it. Is the property of a testator to pay legacy duty both in the country where it is situated, and in that in which the testator dies, or only in the country where the property is situated? and, if the latter, how is the property to be calculated, and how is the duty to be apportioned? There would be immeasurable difficulties attending the application of a rule subject to so many variations. The only sensible rule is to make the property subject to the duty, which the law of the domicile of the testator indicates.

The *Solicitor General* (Sir *W. Follett*), and Mr. *Crompton*, for the defendant in error.—This is the first
(*k*) 6 Mee. & Wels. 511. (*l*) 7 Mee. & Wels. 390.

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time in which mere domicile has been put forward as entirely deciding the question of the liability to legacy duty. The party here has the burden of the execution of the will cast upon him, and in respect of that burden the legacies he pays must be subject to legacy duty. The words of the 36 Geo. 3, c. 52, shew this. [Lord *Campbell*.—You say that the statute attaches on the executor. Then you must make a partition. You cannot say that the statute attaches upon him in respect of property over which it does not give him control. You cannot say that the property abroad must pay English duty.] The statute has not imposed the duty on such property. It is the property which he deals with under the English law that is liable to duty. Before the 36 Geo. 3, c. 52, the legacy duty was only a receipt tax. That speaks decisively as to the place where the duty was to be paid; namely, where the legacy was paid by one party and received by another. In some respects that is kept up by the 27th sec. of the 36 Geo. 3, where a receipt is still required to be taken. The case of *In re Bruce (m)* is no authority the other way; for there the testator was a foreigner. [Lord *Campbell*.—Then you rely on the circumstance that the testator in this case was an English subject.] That is so. The property of a British subject is, under the clear and comprehensive expressions of the statute, liable to legacy. But there is no reason why

the property of a foreigner situated in this country should

executor takes on himself the burden of that administration. In the present instance that place was Scotland, and the Scotch law, therefore, attached upon it.

The Lords, interrupting the argument, intimated that as this was a case of considerable importance, affecting the whole empire, it ought to be argued in the presence of the Judges; but the argument must then be by only one counsel on a side.

This further argument took place on the 17th February, 1845, when Lord Chief Justice *Tindal*, Justices *Maule*, *Coltman*, and *Creswell*, and Barons *Parke*, *Rolfe*, and *Platt* attended in the House.

Mr. *Kelly* (with whom was Mr. *Anderson*, for the plaintiff in error.)—The domicile of the testator or intestate decides the question whether the legacy duty is or is not payable. In this case the domicile was at Demerara, where, by the law of the colony, no legacy duty is payable. None therefore can be demanded. It will be contended for the crown that the duty is payable because the testator was a British subject, and that the very general and extensive words employed in the statute embrace such a case as the present. It will further be argued, that as the property was in part at least locally situated in this country, the duty attaches upon it; but it is submitted that the *situs* of the property does not in the least degree affect the question.

As to the first point, the words of the statute are confined to the wills of persons domiciled in Great Britain, and do not apply to the wills of persons domiciled either in Ireland or the colonies, and cannot certainly apply to the wills of persons domiciled in foreign countries. The words of the statute, however extensive, are not of universal application. To make all these classes of persons subject to the duties imposed by the statute, they should have been expressly named in its provisions. That has not been done, and they cannot by mere implication be rendered liable to burdens of this sort. The decision now impeached

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would, if maintained, operate as a premium on fraud. The legacy duty is claimed because it is said that the debts in Scotland due to the deceased constituted personal estate, to obtain which it was necessary to put the law in motion. Had the Scotch debtors acted honestly, they would have remitted the money to Demerara without the intervention of the law, and according to that argument, no legacy duty would then have been payable.

It cannot be said that the duty payable under this statute is payable upon legacies under wills made in Ireland, for if so, such legacies would have to pay duty twice over, since there is a separate act of parliament imposing a duty on legacies in Ireland. Nor can it be contended that because the testator was a British subject, his property in Demerara was liable to this duty, for that would be to levy a tax in the colonies under the authority of an English Act of Parliament, a right to do which has been distinctly and formally disclaimed by the crown. If the duty attaches at all in this case, it does so only upon the property in this country. But even that ground of liability cannot be insisted on. In the first place, the act makes no distinction as to parts of the property. It does not declare that one part here shall pay, and another part, situated elsewhere, shall not pay. It makes the whole of the personal property liable together, and in respect of one and the same

title. Suppose a man to die in Demerara, and to leave

v. *Pipon* (*p*), explain the confusion, which, upon this point, has arisen in the argument on the other side. So that on the terms of the statute itself it is contended that this duty is not payable.

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Then as to the authorities: *The Attorney General v. Cockerell* (*q*), and *The Attorney General v. Beatson* (*r*), can no longer be considered as law. The case of *In re Ewin* (*s*) clearly settles that the local situation of the property does not affect the question. [The *Lord Chancellor*.—In the case of *Jackson v. Forbes* (*t*), the property at the time of the death of the testator was in this country; in *Ewin's* case it was in the funds of four different foreign countries, so that, putting the two cases together, the circumstances are exactly what they are here.] That is so, and taking the cases together, they form a complete answer to the claim set up here. The words of the act cannot apply to all persons whatever. They must be limited in some way: then how are they to be limited? The authorities shew that they are to be limited by the domicile of the party at the time of his death. *In re Ewin* is a clear authority for that proposition. And so is *In re Bruce* (*u*), where property belonging to a foreigner who died abroad, though such property was situated in England, and was administered by an English executor, was held not liable to legacy duty. The doctrine thus laid down was acted on in *Arnold v. Arnold* (*v*), where Lord *Cottenham* said, "When the act speaks of the will of 'any person whatever,' and makes this duty payable out of the personal estate, it must, I think, be considered as speaking of persons and wills and personal estates in this country." Acting upon that construction, his Lordship held that a testator

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| (<i>p</i>) Ambler, 26. | <i>Forbes</i> , ante, Vol. II. p. 48; |
| (<i>q</i>) 1 Price, 165. | nom. <i>Attorney General v. Jack-</i> |
| (<i>r</i>) 7 Price, 560. | <i>son</i> , 8 Bli. N.S. 15. |
| (<i>s</i>) 1 Cr. & Jerv. 151; 1 Tyr. | (<i>u</i>) 2 Cr. & Jerv. 436; 2 |
| 92. | Tyr. 475. |
| (<i>t</i>) 2 Cr. & Jerv. 382; see | (<i>v</i>) 2 Myl. & Cr. 270. |
| also the <i>Attorney General v.</i> | |

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domiciled in India was not a person who fell within the provisions of the act. To the same effect is the final decision in *Jackson v. Forbes*, which was first decided in the Court of Exchequer(*x*), then went into Chancery, where the decision was affirmed as of course, and finally came here(*y*). It is true, that in moving the judgment on that case in this House, Lord *Brougham* said(*z*), that he did not overrule any of the former cases; but still it is clear that the judgment of this House proceeded on the law of the domicile, as that which decided the liability to legacy duty, a circumstance which was quite inconsistent with two of the cases there referred to in argument. The case of *In re Coales*(*a*), which occurred some time afterwards in the Court of Exchequer, shewed that the law as laid down in the *Attorney General v. Forbes*, was considered as settled. The question came again to be considered in the *Commissioners of Charitable Donations v. Devereux* (*b*), where, though the will was that of a British subject, and the executors were likewise British subjects, and the property was situated in this country, the Vice Chancellor held, that the domicile of the testator determined the question, and as that domicile was in a foreign country, the duty was not payable.

On the authorities therefore, as well as on the construction of the act itself, the judgment of the court below
 ought to be reversed.

the decisions rested on the principle of domicile. That is not the true principle by which the law, applicable to such a case as the present, is to be determined. The duty attaches here, wherever there is a person acting in this country in execution of the will. That is the principle which must govern the decision, and which will alone reconcile all the cases.

By all the statutes passed before the 36 Geo. 3, the legacy duty was payable on the receipt of the money. If a native paid a legacy to a foreigner, that legacy would, on the payment being made, have been liable to the receipt stamp duty. That shews that there was no statutory distinction as to liability. In passing that statute it was not the intention of the legislature to change the liability, and merely to impose a higher rate of duty. The liability remained as before. That liability depends on the act of administering the fund. The question, therefore, is whether the act of administering the fund in Scotland was the act of paying legacies, whether it was an act done in Great Britain, so as to enable the provisions of the statute to attach upon it; for it must be admitted that in terms this is a statute limited to Great Britain. No one can doubt that here has been an act of paying legacies within Great Britain; and the provisions of the statute do therefore attach upon it. What are the words of the statute 55 Geo. 3, c. 184? They are (adopting those used in the 36 Geo. 3, c. 52, s. 2) that "for every legacy, specific or pecuniary, given by any will of any person out of his personal or moveable estate, or out of or charged upon his real or heritable estate," the duties imposed by that act shall be payable. It is impossible to employ words more general and comprehensive, and the burthen of shewing that these legacies are not liable to the duty, lies upon those who claim the exemption, and must be made out by something more direct than the supposed application of a principle of law, which, however well established, must be deemed inapplicable to

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the fiscal regulations of a country. Here there is a British subject "taking on himself the execution of the will," that being the very expression used in the earliest acts of parliament, and paying legacies out of the personal estate. Where the case is so clearly within the words of the statute, the principle of domicile cannot apply to make those words inoperative. The property, the executor, and the legatees, were in this country, and the executor was obliged to take out probate here in order to administer that very property. The honesty or dishonesty of the debtor does not affect the matter. The question is whether a probate was necessary or not—was the unappropriated property in this country, which the party got possession of in his representative character,—a character with which the English law clothed him, and did he distribute it to legatees in this country? These questions must be answered in the affirmative. It may be admitted that, if after probate taken out, the money had been voluntarily paid by the bankers: the mere act of taking out probate would not of itself decide the question, whether the legacy duties were payable or not. The real question is whether the party obtained the money in his representative character under the probate, or only as the mere attorney or agent of the testator. The argument on the other side would go to relieve a party from the payment of the legacy duty, though some of the legacies were specifically payable abroad; and some specifically payable here. Now, not one of the authorities goes further than to say that where the appropriation of the fund has been made abroad, and the fund is transmitted here, and a mere act of payment by an agent under the authority of that foreign appropriation is made here, the legacy duty is not payable. No such specific appropriation was made here. So that even if the law was as thus stated, it would not exempt the party in this instance from the payment of the duty.

The domicile may fix the law of the succession; but it does not affect the payment of the legacy duty. The earlier

authorities are all supposed to have been overruled by the case of *The Attorney General v. Forbes* (a), but though the authority of *The Attorney General v. Cockerell* (b), and *The Attorney General v. Beatson* (c), may, perhaps, not be sustainable to the full extent of what was once supposed to be the rule they laid down, they are consistent with the principle now submitted as that on which the House will decide, namely, that the liability to duty attaches on administration of the fund in this country; and to that extent at least they are valid authorities. In the latter of these two cases especially, Mr. *Murray*, who was the residuary legatee, and, as such, entitled to the whole of the money, might have received it from the agents to whom it was transmitted; but he, unnecessarily, took out administration with the will annexed, and the Court therefore held that the legacy duty attached upon the property afterwards received by him. The case of *Logan v. Fairlie* (d) does not impeach this principle. On the contrary, the principle now contended for was laid down in the first decision there by the Vice Chancellor, and was subsequently applied by Lord *Cottenham* (e), who, however, excepted that case from its operation, because he held that there the money had been directly appropriated in the East Indies, and devoted to a particular and distinct purpose here; so that all that was done here was the mere act of paying by the hands of an agent. [*The Lord Chancellor*.—The last case of *Logan v. Fairlie*, is nothing more than this: The Court did not decide any other question than whether there had been or not an appropriation in India.] But Lord *Cottenham* must be taken to have admitted the rule as to the liability to duty laid down by the Vice Chancellor. [*The Lord Chancellor*.—Nothing was decided but the question of appropriation.] The case of *Jackson v. Forbes* (f) is no

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(a) *Ante*, Vol. II., p. 48.

(b) 1 Price, 165.

(c) 7 Price, 560.

(d) 2 Sim. & Stu. 234.

(e) 1 Myl. & Cr. 59, 68.

(f) 2 Cr. & Jerv. 282.

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authority for the plaintiff in error ; for that turned on the question whether the fund had or had not been appropriated in India. The same observation may be made on that case, when under the name of *The Attorney General v. Forbes* (g), it came before this House. Lord Brougham there(h) referred to the two cases of *Attorney General v. Cockerell*, and *Attorney General v. Beatson*, and said that the House did not overrule any of the preceding cases, but that each rested on its peculiar circumstances. The next case is that of *Arnold v. Arnold* (i) and though it must be admitted that that case cannot be reconciled with the cases of the *Attorney General v. Cockerell*, and *The Attorney General v. Beatson*, yet in delivering judgment there, Lord Cottenham took great care to shew that it did not fall within the authority of *Logan v. Fairlie*. [*The Lord Chancellor*.—I consider that in all these cases domicile was the basis of the whole judgment ; the only question was what was the effect of the other circumstances upon the rule of domicile.] It seems difficult to come to that conclusion, since the rule as to domicile would have rendered quite unnecessary any discussion as to the appropriation of the fund. Domicile, in some of these cases, never was argued upon, and was not made the ground of the decision. This is especially to be observed in the case of *Arnold v. Arnold*. [*The Lord Chancellor*.—In that case all the funds were sent here from India, to be administered here according to the will.] No ; they were sent for the mere purpose of being paid to the legatees. Strictly speaking, there was no administration here—that is a term of a technical nature. If the fund is sent over to be divided, it is sent over for the purpose of administration ; but if it is sent merely to be paid, the person paying it would exercise no discretion, and then there would be no administration.

If this statute does not apply to property coming from abroad to be distributed in this country, how can the pro-

(g) *Ante*, Vol. II., p. 48.

(i) 2 Myl. & Cr. 256.

(h) *Id.* 82.

bate duty be payable? There can be no distinction in principle between probate and legacy duty. Both are the subjects of the fiscal regulations of this country. [The *Lord Chancellor*.—If a will is made by a foreigner resident abroad, and it is necessary to administer his estate in England, probate must be taken out for that purpose, and probate duty becomes payable upon the mere taking out of the probate; but the question here is, whether under such circumstances, legacy duty will be payable.]

In the case of *In re Bruce* (j), the Court asked whether *Bruce* was a foreigner. That question would not have been put, if domicile could have given the rule. According to *Doe v. Acklam* (k), there could be no doubt that *Bruce* having elected the United States as his country, was a citizen of those states, and the case proceeded on that fact, and he was held entitled to transmit property to this country free from any British burden. That, however, is bad law. Property in this country is liable to British burdens, although it may be a foreigner's property. *In re Coales* (l). The income tax is a proof of this.

The *Attorney General v. Dunn* (m) is the first case in which the question of domicile was distinctly submitted to the Court; but, as the Court held that in fact the testator had an English domicile, that question was not decided. The last case on the subject is that of *The Commissioners of Charitable Bequests v. Devereux* (n), and it is impossible that the Vice Chancellor could have said what is there imputed to him, for he is made to refer to *Re Bruce*, and to say, "whether the testator there was a British subject does not appear;" when it does most clearly appear from several parts of that case that *Bruce* was a foreigner. [The *Lord Chancellor*.—The decision as reported in the *Jurist* is right, but the judgment is wrong in terms. It does not matter,

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(j) 2 Cr. & Jer. 436.

(m) 6 Mee. & Wels. 511.

(k) 2 Barn. & Cres. 779.

(n) 6 Jurist, 616; since re-

(l) 7 Mee. & Wels. 590.


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for the purpose of this argument, what are the expressions used, but what was the point decided? According to my view of the subject, the decision there was correct, for the domicile was in France.]

There is one case decided in Scotland, by Lord Chief Baron *Shepherd*, which, if considered an authority, must govern the present. It is the case of the *Advocate General v. Col. F. W. Grant*. There the party was domiciled abroad; he made a will; the executor resided in Scotland, The testator had real and personal property in Scotland, and he left legacies (which were charged on the realty,) to persons who were resident there. The will was administered in Scotland, and the Court held that the legacy duty attached. This case is stated from the copy of the notes of the Chief Clerk of the Remembrancer's office in Scotland, and is directly in point with the present. The Court there said that the executor being resident in Scotland, the question as to the testator residing, and the will being made abroad, did not arise, and that the real principle was that the law affected British property, that is to say, property to which the party derived title from British law and British courts.

This case differs from the Indian cases in one very important respect. In them, the property, at the time of the death of the testator, was in India; here it was in Scotland.



admits of. The argument has been an able one; but, notwithstanding what has fallen from him, we do not think it necessary to hear Mr. *Kelly* in reply. I propose to put the following question to the Judges:—"A., a British born subject, born in England, resided in a British colony. He made his will, and died domiciled there. At the time of his death he had debts owing to him in England. His executors in England collected these debts, and out of the money so collected paid legacies to certain legatees in England. The question is, are such legacies liable to the payment of legacy duty?"

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Lord Chief Justice *Tindal*, in the name of his brethren, requested time to consider the question.

The request was acceded to, and the House was adjourned during pleasure. In about an hour the House was resumed.

Lord Chief Justice *Tindal* then delivered the unanimous opinion of the Judges. Having read the question put to the Judges he said: In answer to this question I have the honour to inform your Lordships that it is the opinion of all the Judges who have heard the case argued, that such legacies are not liable to the payment of legacy duty.

It is admitted in all the decided cases, that the very general words of the statute, "every legacy given by any will or testamentary instrument of any person," must of necessity receive *some* limitation in their application, for they cannot in reason extend to every person, everywhere, whether subjects of this kingdom or foreigners, and whether at the time of their death domiciled within the realm or abroad. And as your Lordships' question applies only to legacies out of personal estate, strictly and properly so called, we think such necessary limitation is, that the statute does not extend to the will of any person who at the time of his death was domiciled out of Great Britain, whether the assets are locally situate within England or

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not. For we cannot consider that any distinction can be properly made between debts due to the testator from persons resident in the country in which the testator is domiciled at the time of his death; and debts due to him from debtors resident in another and different country; but that all such debts do equally form part of the personal property of the testator or intestate, and must all follow the same rule, namely, the law of the domicile of the testator or intestate.

And such principle we think may be extracted from all the later decided cases, though sometimes attempts have been made, perhaps ineffectually, to reconcile with them the earlier decisions. There is no distinction whatever between the case proposed to us and that decided in the House of Lords, the *Attorney General v. Forbes* (o), except the circumstance that in the present question the personal property is assumed to be, for the purpose of the probate, locally situated in England, at the time of the testator's death. But that circumstance was held to be immaterial in the case *In re Ewin* (p), where it was decided that a British subject dying domiciled in England, legacy duty was payable on his property in the funds of Russia, France, Austria, and America.

And again in the case of *Arnold v. Arnold* (q), where the testator, a natural born Englishman, but domiciled in India, died there, it was held by Lord Chancellor Cotten-

tive character in this country, and that in case of such administering, the legacy duty was payable, we think it is a sufficient answer thereto that the liability to legacy duty does not depend on the act of the executor in proving the will in this country, or upon his administering here; the question, as it appears to us, not being whether there be administration in England or not, but whether the will and legacy are a will and legacy within the meaning of the statute imposing the duty.

For these reasons we think the legacies described in your Lordships' question are not liable to the payment of legacy duty.

The Lord Chancellor.—My Lords, in consequence of something that was thrown out at your Lordships' bar, I think it proper to state that it was not from any serious doubt or difficulty which we considered to be inherent in this question in the former argument, that we thought it right to ask the opinion of the Judges, but it was on account of its extensive nature; and, because though the question applied only to Scotland in the form in which it was presented to your Lordships' house, it did in reality and in substance apply to the whole empire—not only to Great Britain, but in substance to Ireland, and to all the British possessions. We thought it right, therefore, in consequence of the extensive nature and operation of the question, that the case should be argued a second time; and we also thought, from the nature of the question, that it was proper to require the attendance of Her Majesty's Judges upon the occasion, because we thought that the judgment of your Lordships' house being in concurrence with the opinion of the learned Judges, would possess that weight with your Lordships, and with the country, which upon all occasions it is desirable it should receive.


My Lords, it appeared to me in the course of the argu-

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ment that the question turned, as it must necessarily turn, upon the meaning of the statute. In the very first section of the statute the operation of it is limited to Great Britain. It does not extend to Ireland. It does not extend to the colonies. And, therefore, notwithstanding the general terms contained in the Schedule, those terms must be read in connection with the first section of the act, and it is clear, therefore, that they must receive that limited construction and interpretation, which is alone consistent with the first section of the act. Accordingly, my Lords, it has been determined in the case that was cited at the bar, *In re Bruce* (r), that it does not apply, notwithstanding the extensive terms in which it is framed, to the case of a foreigner residing abroad, and a will made abroad, although the property may be in England, although the executors may be in England, although the legatees may be in England, and although the property may be administered in England. That was decided expressly in the case *In re Bruce*, which decision, so far as I am aware, has never been disputed, but in which the Crown seems to have acquiesced.

Also, my Lords, it has been decided in the case of British subjects domiciled in India, and having large possessions of personal property, which come to be disposed of in England, that the legacy duty imposed by the Act of Parliament does not apply to cases of that description.



was in England at the time of the death of the testator, a circumstance that did not exist in the case of the *Attorney General v. Forbes*, and which did not exist in the case of *Arnold v. Arnold*; and it is supposed that some distinction is to be drawn with respect to the construction of the Act of Parliament arising out of that circumstance. I apprehend that that is an entire mistake, that personal property in England follows the law of the domicile, and that it is precisely the same as if the personal property had been in India at the time of testator's death. That is a rule of law that has always been considered as applicable to this subject; and accordingly the case which has been referred to by the learned Chief Justice, the case of *In re Ewin* (s), was a case of this description. An Englishman made his will in England: he had foreign stock in Russia, in America, in France, and in Austria. The question was whether the legacy duty attached to that foreign stock, which was given as part of the residue, the estate being administered in England; and it was contended, I believe, in the course of the argument by my noble and learned friend who argued the case, in the first place, that it was real property, but, finding that that distinction could not be maintained, the next question was whether it came within the operation of the act, and although the property was all abroad, it was decided to be within the operation of the act as personal property, on this ground, and this ground only, that as it was personal property, it must, in point of law, be considered as following the domicile of the testator, which domicile was England.

Now, my Lords, if you apply that principle, which has never been quarrelled with, which is a known principle of our law, to the present case, it decides the whole point in controversy. The property, personal property, being in this country at the time of the death, you must take the

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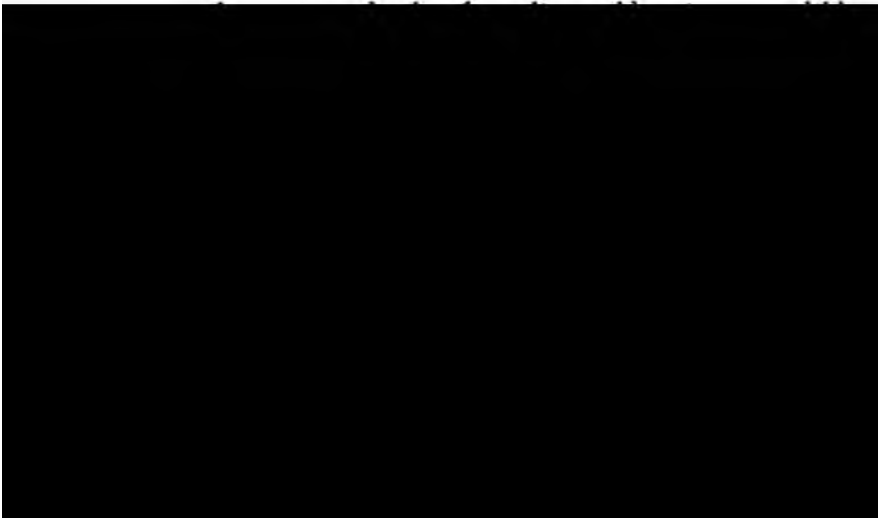
(s) 1 Crom. & Jer. 151.

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principle laid down in the case of *In re Ewin* (t), and it must be considered as property within the domicile of the testator, which domicile was Demerara. It is admitted that if it was property within the domicile of the testator in Demerara, it cannot be subject to legacy duty. Now, my Lords, that is the principle upon which this case is to be decided. The only distinction is that to which I have referred, and which distinction is decided by the case *In re Ewin* to be immaterial.

Now, my Lords, such being the case and the principle upon which, I think, this question should be decided, I was desirous of knowing what were the grounds of the judgment of the Court below. I find that the judgment was delivered by two, or, rather, that the case was heard by two very learned judges, Lord *Gillies* and Lord *Fullerton*. The judgment was delivered by the late Lord *Gillies*. I was anxious, therefore, from the respect which I entertain for those very learned persons, to know what were the grounds upon which their judgment was rested.

The first case to which they referred, for it was principally decided upon authority, was a case decided before Sir *Samuel Shepherd*, Chief Baron of Scotland. That case in the judgment was very shortly stated, and I am very happy that the Solicitor General gave us the particulars of that case, for it appears that the legacy was charged upon



the case ; and no decision, in fact, was given upon the point. The Lord Chief Baron pointedly reserved his opinion, and said, that he should not express what his opinion was ; also the learned Judge near me, Mr. Baron *Parke*, expressed the same thing. It is true, that one of the learned Judges said that, at that moment, according to the impression upon his mind, he rather thought the duty would be chargeable ; he expressed himself in those terms according to his immediate impression ; but no decision was given upon the point, it was a mere *obiter dictum*—and surely such a *dictum* as that ought not to be cited as the foundation of a judgment of this description. Looking at the authorities, therefore, they appear to me not properly to support the judgment of the Court below.

The third authority was that of Lord *Cottenham*. Now, Lord *Cottenham* in the case of *Arnold v. Arnold* (v), expressly states in terms, that the two cases, *The Attorney General v. Cockerell* (w), and *The Attorney General v. Beatson* (x), he considered to have been overruled. He states that in precise terms. A particular passage is selected from the judgment of Lord *Cottenham* to support the opinion of the learned Judges in the Court below, but I am quite sure when that passage is read in connection with the whole judgment of that very learned person, every person reading it with attention must be satisfied that the inference drawn from that particular passage that was cited is not consistent with the whole tenor of the judgment. It appears to me, therefore, that none of the authorities cited by the Court below sustained the judgment ; and I am of opinion, therefore, independently of the great respect which I entertain for the judgment of the learned Judges who have assisted us upon this occasion, that upon the true construction of the Act of Parliament, and apply-

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(v) 2 Myl. & Cr. 256.

(x) 7 Price, 560.

(w) 1 Price, 165.

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ing the known principles of the law to that construction, the legacy duty is not in a case of this description chargeable. I shall, therefore, move that the judgment in this case be reversed.

Lord *Brougham*.—My Lords, I entirely agree with my noble and learned friend in the view which he takes of the construction of this statute, and of the authorities, and of the argument, so far as it is there endeavoured to distinguish this case from that of *The Attorney General v. Forbes (y)*, which must be taken with *In re Ewin*, a case that also arose in the Exchequer, and when the two cases are thus considered, no doubt can be felt upon the matter. I so entirely agree upon all those three heads with my noble and learned friend, that I do not think it necessary for me to do more than generally to express my concurrence. I wish, however, also to add that my recollection coincides perfectly with his as to the reasons for troubling the learned Judges to attend in this case. It was not only that it was a case from the Scotch Exchequer, but it was a case which must impose a construction upon the General Legacy Act, applicable to England and to all the British colonies, and to foreign countries; and, therefore, we considered that it was highly expedient to have a general consideration of the case, and the assistance of the learned Judges. But we also felt this, which I am sure the

the authority of *Jackson v. Forbes* (x), in the Exchequer, and afterwards before me in Chancery, and ultimately before your Lordships in this House, by appeal on a Writ of Error (a); there was that authority on the one hand, with the decision of the Exchequer not appealed against, in the matter of *Ewin* (b) on the other, and the authority of those decisions appeared to be marked by some discrepancy at least, more apparent perhaps than real, with the two former cases of *The Attorney General v. Cockerell* (c) and *The Attorney General v. Beatson* (d). It became, therefore, highly expedient that we should maturely weigh the whole matter, before we held that that decision of the House of Lords in *The Attorney General v. Forbes* had completely overruled those other cases, the rather because certainly words were used in disposing of the *Attorney General v. Forbes* which seemed to intimate the possibility of those former cases standing together with the latter case. Upon full consideration, however, I am clearly of opinion with Lord Cottenham, who expressed that opinion very strongly in the case of *Arnold v. Arnold*, that those two cases of *The Attorney General v. Cockerell*, and *The Attorney General v. Beatson*, cannot stand with the case of the *Attorney General v. Forbes*. Then, my Lords, that last case must be considered not merely by itself, as regards its bearing upon the facts of the present case, but it must be taken into consideration coupled with the case of *In re Ewin*, because otherwise ground might be supposed to exist for distinguishing the two cases, inasmuch as it might be, and has been contended, and ably contended at the bar, that the one case does not apply to the other, because part of the funds were in the present case locally situated in this country. But then take the case of *Ewin*,

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(x) 2 Crom. & Jerv. 382.

(b) 1 Crom. & Jerv. 151.

(a) *Nom. The Attorney General v. Forbes*, ante, Vol. II., p. 48; and *nom. The Attorney General v. Jackson*, 8 Bli. 15.

(c) 1 Price, 165.

(d) 7 Price, 560.

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and your Lordships must perceive at once, as my noble and learned friend has done, and as the learned Judges have done, that those two cases together in fact exhaust the present case, because what was wanting in the *The Attorney General v. Forbes*, is supplied by the decision in the matter of *Ewin*; I will not say, supplied in terms; but in what comes to the same thing, in the argument upon the construction of the Statute, and in the legal application of the principle, the converse was decided. Here it is a case of money or property brought over here and administered here, the domicile of the testator or intestate being abroad out of the jurisdiction. There, in the matter of *Ewin*, it was the converse, administration being by a person domiciled here, and a testator or intestate domiciled here, and the funds locally situate abroad; it is perfectly clear that no difference can be made in consequence of that, because the principle, *mobilia sequuntur personam*, as regards their distribution and their coming or not within the scope of this Revenue Act, must be taken to apply to two cases precisely similar; and the rule of law, indeed, is quite general that in such cases the domicile governs the personal property, not the real; but the personal property is in contemplation of the law, whatever may be the fact, supposed to be within the domicile of the testator or intestate.

Lord *Brougham*.—That makes it still more clear that the foundation of their decision was unsound. It is to be taken into account that Lord *Cottenham* does not give his opinion in *Arnold v. Arnold* merely upon the authority of the *Attorney General v. Forbes*, because he expressly says, and very candidly and fairly says, doing justice to the grounds of the decision of your Lordships in this House, that, independently of authorities, he is of the same opinion, and should have come to the same opinion as we did in that case, notwithstanding the conflict that appears to exist between other cases. We have, therefore, the clearest reasons for saying that if my noble and learned friend had not been unfortunately absent to day, he would have concurred entirely in this view of the case.

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Upon the whole, therefore, I entirely concur in the opinion of my noble and learned friend, and acknowledge fully, and with thanks, the assistance which we have derived from the learned Judges (giving the reasons which I have given for our wishing to have their attendance rather than from any great doubt or difficulty which we felt the case to be encumbered by); and, therefore, my Lords, I second my noble and learned friend's motion, that judgment be given for the plaintiff in error.

Lord *Campbell*.—My Lords, I confess that in this case I did once entertain very considerable doubts; and I was exceedingly anxious that your Lordships should have the assistance of the Queen's Judges in a case that admitted, as it seemed to me, of great doubt, and where the decisions were directly at variance with each other. Having heard the opinion of the learned Judges, it gives me extreme satisfaction to say that I entirely concur in it, and that the doubts which I before entertained are now entirely removed. Having heard the opinion of the learned Judges, I defer to it with the greatest possible respect, as I certainly should have done under any circumstances,

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though, if it had not satisfied my mind, of course I should have found it my duty to act upon the result of my own judgment; but with the assistance of the learned Judges, under the present circumstances, I am relieved from anything of that sort, because I agree with them in the result to which they have arrived, and in the reasons which they have assigned for the opinion which they have given to your Lordships.

At the same time, my Lords, I believe that if the Chancellor of the Exchequer, who introduced this bill into Parliament, had been asked his opinion, he would have been a good deal surprised to hear that he was not to have his legacy duty on such a fund as this, where the testator was a British born subject, and had been domiciled in Great Britain, and had merely acquired a foreign domicile, and had left property that actually was in England or in Scotland at the time of his decease. The truth is, my Lords, that the doctrine of domicile has sprung up in this country very recently, and that neither the Legislature nor the Judges, until within a few years thought much of it; but it is a very convenient doctrine, it is now well understood, and I think that it solves the difficulty with which this case was surrounded. The doctrine of domicile was certainly not at all regarded in the case of *The Attorney General v. Cockerell*, nor in that of *The Attorney General v. Beatson*.

If it had been the question at that time, there would have

Legislature intended to impose this tax. If a testator has died out of Great Britain with a domicile abroad, although he may have personal property that is in Great Britain at the time of his death, in contemplation of law that property is supposed to be situate where he was domiciled, and, therefore, does not come within the act: this seems to be the most reasonable construction to be put upon the Act of Parliament; it is the most convenient, any other construction would lead to very great difficulties, and, I think, the rule which is laid down by the learned Judges may now be safely acted upon, and will prevent difficulties and doubts arising hereafter. But I think that this caution should be introduced, that this applies only to legacy duty, not to probate duty. With respect to the probate duty, if it is necessary to take out probate, the property being in Great Britain, for the purpose of administering that property, the property would still be considered as situate in Great Britain, and the probate duty would attach. All the cases respecting probate duty are considered untouched; but, with respect to the legacy duty, those two cases, *The Attorney General v. Cockerell* and *The Attorney General v. Beatson*, must be considered as completely overturned, and domicile with respect to legacy duty is hereafter to be the rule.

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The Lord Chancellor.—There is no question in the case as regards the probate duty, it cannot be supposed for a moment that this affects the probate duty. Your Lordships will allow me, in your name, to tender our best thanks to the learned Judges for their attendance to this case.

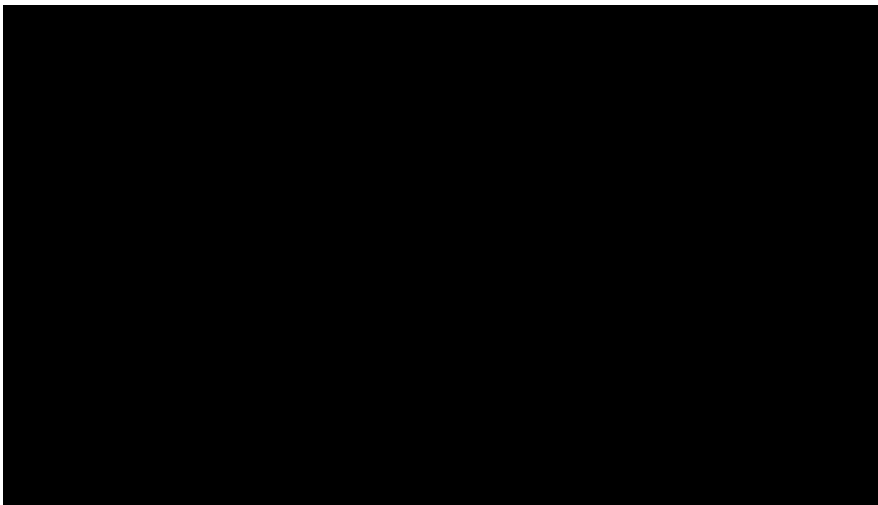
Judgment of the Court below reversed.

1845. EDWARD HENRY RICKARDS AND SAMUEL
Feb. 25. WALKER - - - *Appellants.*
 HER MAJESTY'S ATTORNEY GENERAL - *Respondent.*

Practice. A n information filed by the Attorney General at the relation of
Information. *A.* and *B.*, praying for the Crown the benefit of a judgment
Relator. in outlawry against *C.*, and that a deed executed by *C.*, con-
Impertinence. veying his property to trustees, might be set aside as fraudu-
 lent and void against the Crown, contained short statements
 shewing the interest of the relators, and alleging that the mo-
 tives for the deed were to defraud *C.*'s creditors :—
 Held that these statements were not impertinent.

Exceptions for impertinence cannot be sustained unless it appears
clearly that the statements excepted to cannot be material at
the hearing of the cause.

Although it is not necessary that a relator in an information
should have an interest in the subject of the suit, yet a statement
shewing his interest is not impertinent, as in the event of the
suit failing, the costs may be more easily apportioned.



the year 1817, the said *Annesley*, then residing in Devonshire, passed his bond for 300*l.* to *George Stulz*, upon whose death in 1832, the said *Engler* became his legal personal representative, and *that by indenture of assignment, bearing date the 19th of August, 1833, the said Frederic Engler, for good and valuable considerations, duly assigned the said bond and all principal monies and interest due or to become due thereon unto the said John Stulz and Samuel Housley, both of Clifford Street, &c.; and thenceforth the said debt remained due to the said Engler at law; but in trust as to the beneficial interest therein for the said J. Stulz and S. Housley.*

The information then stated that in an action brought on the said bond, a judgment of outlawry was obtained against *Annesley* in 1835, and the same was duly registered on the 31st July, 1841. That a writ of *capias utlagatum* was then issued to the sheriff of Oxfordshire, who held an inquisition pursuant thereto on the 18th of October, 1841, and by his return certified that the said *Annesley* was seised in fee of estates in that county, of the yearly value of 3,000*l.*, all which the said sheriff had seised into her Majesty's lands; that the said return was quashed on the 11th of Nov. 1841, and on the 17th of that month a new writ of *capias utlagatum* was issued to the same sheriff, returnable on the 11th of Jan. 1842; that the said sheriff accordingly held an inquisition on the 8th of Jan., 1842, at which the appellant, *Rickards*, a solicitor, attended on behalf of *Annesley*, and produced an indenture or deed of trust dated the 27th of December 1841, and made between *Annesley* of the 1st part, the appellants of the 2d part, and creditors of *Annesley*, who had executed, or should execute the same, of the 3d part; by which *Annesley* demised all his estates in Oxfordshire and Huntingdonshire to the appellants, for a term of years, upon trust as therein mentioned. And that the said sheriff made his return to the last-mentioned writ, and

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thereby certified that *Annesley* had not then, nor on the day of the date of that writ, any goods and chattels, lands or tenements, within his bailiwick.

The information, after alleging that the sheriff's last return was founded entirely on the said deed of trust, and that the same was without consideration and void under the circumstances, stated "That the said indenture was fraudulent and not *bonâ fide*, and the same was devised and contrived fraudulently for the purpose and intent to delay, hinder, or defraud the creditors of the said defendant *Arthur Annesley* of their just and lawful actions, suits, debts, and demands, and in particular to delay and defeat the debt of the said *Frederic Engler*, and his proceedings in or under the said outlawry. That at and before the time of executing the said indenture, the said defendant *Arthur Annesley*, was residing at *Holyrood House* for the purpose of avoiding his creditors, or of preventing or delaying their proceedings against him, and he was in very embarrassed circumstances, and indebted in very large sums of money which he was wholly unable to pay."

The information, after other statements, not material to be here mentioned, charged, among other things, that "*Annesley* was in embarrassed circumstances, and he resided and remained at *Holyrood House* aforesaid for the purpose of avoiding his creditors, and with a view to prevent or defeat the proceedings of any creditor or creditors against him." And after interrogating to the statements and charges in the usual form, the information prayed, that the Attorney General on the behalf of her Majesty might have the benefit in equity of the said judgment of outlawry, and of the said writ of *capias utlagatum* issued thereon, and that the said deed of trust might be declared fraudulent and void as against the right of her Majesty under and by virtue of the said outlawry, and that all the estate and interest which belonged to the defendant *An-*

nesley in the lands and hereditaments, comprised in the said deed (or in case the same be to any extent valid, then such estate or interest as still belonged to him beneficially in the same lands and hereditaments), might be answered to her Majesty, &c.; and the information prayed for an account against the appellants, and for an injunction to restrain them from paying any of the rents of the estates to *Annesley*, and for a receiver.

The appellants appeared to the information in January, 1843, and filed seventeen exceptions thereto for impertinence, seven to the stating and charging parts, and ten to the corresponding interrogating parts. The Master to whom these exceptions were referred allowed ten of them, viz., five to the above statements and charge, and five to the corresponding interrogatories. The *Attorney General* excepted to the Master's report, and that exception was allowed by the Master of the Rolls by his order dated the 28th of April, 1843 (*b*). The appellants appealed against that order to the Lord Chancellor, who, by an order dated the 1st of March, 1844, dismissed the appeal (*c*).

This appeal was against both those orders.

Mr. *Wakefield*, for the appellants (*d*).—The passages in the information to which exceptions were allowed by the Master, are wholly immaterial, and can in no way aid or affect the relief prayed for, which is confined to the rights of the Crown. In that relief neither the relators nor the creditors of *Annesley* have any interest at law or in equity, and therefore those statements with the corresponding charges and interrogatories, alleging an interest in the

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(*b*) 6 Beav. 444.

(*c*) 1 Phillips, 383.

(*d*) The cause had been appointed for hearing on the 24th February, but no counsel appearing that day for the ap-

pellants, and there being counsel for the respondent, the hearing was adjourned to the next day, the appellants paying the costs of the day.

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former, or a fraud on the latter, are irrelevant and impertinent. The relators in an information are not required to have any interest in the subject; and if they claim an interest, they ought to have filed a bill as well as an information (e). There is no connection between the two allegations of fraud on the Crown and on the creditors.

The Lord Chancellor.—The information charges the deed of trust to be fraudulent against *Annesley's* creditors. Suppose the object of the party in executing that deed was to defraud his creditors, was not the narrative of the transaction material?

Mr. Wakefield.—Certainly not. The information seeks to recover the property for the Crown, and the relief is confined to the rights of the Crown, which is a common law right. The conveyance away of property in fraud of creditors was not illegal until the Statute of *Elizabeth* (f) made it so. At common law, an alienation of property before judgment in outlawry was good as against creditors (g). It was to remedy this evil that the statute was passed for the benefit of creditors only. The alleged fraud against that statute cannot be joined in an information to the common law fraud on the Crown. There was in fact no fraud at all committed by Mr. *Annesley*. A trust created by a party in favour of himself and other persons is not within the Statute of Frauds (h); *Doe, d. Hull v. Greenhill* (i).

Lord Campbell.—The fraud charged by the information

The Lord Chancellor.—It appears by the dates that, between the quashing of the return to the first writ, and the issuing of the second, this party conveyed his estates to his attorneys, in fraud of his creditors. Why may not a party questioning the validity of the conveyance state all the facts relating to its execution, all the circumstances of the transaction, as part of the narrative? It may be objectionable on the ground of prolixity. There never was a bill or information that had not some unnecessary statements.

Mr. Wakefield.—A party may put such statements into a bill claiming relief against the transaction, but not in an information to enforce the right of the Crown only. We say those statements are not merely unnecessary, but injurious to us. The information complains of two frauds, fraud on the common law right of the Crown under the outlawry, and a statutable fraud on the creditors, which two frauds have no connection with each other, but make the information multifarious. If, in an indictment for breaking into a man's house, is added a charge for breaking into another man's house, that is bad criminal pleading. And so if the doctrine involved in the orders, of which the appellants complain, be upheld, and these objections remain over to the hearing of the cause, it would be as well to expunge at once all the rules of pleading as to impertinence in equity.—[*The Lord Chancellor.*—Why did you not demur?—I understand there was some delay, during which the time for demurring expired. There is no doubt that upon demurrer these exceptionable statements would be struck out, and that is the test of materiality.—[*Lord Campbell.*—Would it not be material to the defence in this cause to shew that there was a *bonâ fide* consideration for the deed? Was it not material to the case of the *Attorney General* to anticipate that defence by stating that there was no such consideration, and that the deed was fraudulent?—The defendants might admit that there

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was no consideration, and yet contend that there was no fraud on the Crown. There was not, in fact, any property in *Annesley* at the time. The information shews that, for it states the recital in the deed, that he was "tenant for life of divers estates which were subject to various mortgages and incumbrances." Forfeiture by outlawry affects only such lands as the outlaw is seised of on the day he is outlawed or subsequently. It is not the principle of Courts of Equity to enforce forfeitures, but to relieve against them; it is contrary to equity to allow two allegations of fraud distinct in themselves, one a private, the other a public fraud, to be joined to aid a forfeiture, which it is the duty of the Court to prevent; *Nector v. Gennett* (j). It is unnecessary to argue that the statements of Mr. *Annesley's* embarrassments and his residence in *Holyrood House* are wholly irrelevant, and therefore impertinent.

Mr. *Kenyon*, on the same side.—This case involves important points of practice. It tends to the advancement of justice, and facilitates the administration of it in Courts of Equity, to keep the rules of pleading there as concise and cogent as they are now made at law. This information states various matters not necessarily connected, and prays a single relief. The relief prayed ought to be a

bond to the other relators, and that they had the beneficial interest in the debt; or with the other statements, that the conveyance made by *Annesley* to the appellants was a fraud on his creditors, and that he, for the purpose of delaying their proceedings against him, was residing at *Holyrood House*. If these passages were omitted, the other statements and charges in the information would be sufficient, if true (*k*), to sustain the prayer, and the proper test is to read the information without the passages that are excepted to.

The introduction of these passages is defended on the ground that they are a narrative of the circumstances descriptive of the transaction, which is impeached, and, like surplusage at common law, they may remain on the record, though immaterial to the issue, or at all events until it is seen at the hearing whether they are material or not. But in equity the rule is to strike out every immaterial statement before the hearing, in order that the Judge's mind may not be distracted by irrelevant matter. And in this case the question on the record is of such importance that it ought to be submitted for decision free from all extraneous matter. If, by the statements which are the subject of the first and second exceptions, it was intended to show an interest in the relators, there should be a bill as well as an information; but as there is no bill, and as it is not necessary that relators should have any interest in the subject matter of an information, these statements are irrelevant, and therefore impertinent. The Lord Chancellor in his judgment admitted them to be blots, saying "*non ego paucis offendar maculis.*" But it should be remembered that these are not the hasty efforts of a young draughtsman, but the mature productions of the late Attorney General, of whom the Lord Chancellor might more appropriately say "*aliquando bonus dormitat*

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(*k*) The learned counsel emphatically denied, as did his learned leader, that any fraud was committed.

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Homerus." His Lordship's judgment (*l*) was founded on grounds quite different from those of the Master of the Rolls' judgment (*m*). The House by reversing both judgments would maintain a most wholesome rule of pleading.

Mr. *Turner* and Mr. *Campbell* were for the respondent, but were not called upon.

Lord *Brougham*.—In this case the question is a very important one—whether these allegations should be struck out for impertinence or not. If I had seen that the allegation respecting the party residing at *Holyrood* House, framing a conveyance for the purpose of defrauding his creditors, was so clearly immaterial and of necessity so impertinent to the question raised before the Court—namely, the question raised by the Attorney General's information on behalf of the Crown touching the same conveyance made during the outlawry, and to defeat the outlawry, which was the only question raised on the information—if I had seen that there was no possible connection between the two, that the one could have no bearing on the other, that when the case was at hearing, there was no possibility of the one interfering with the other—I should then have been of opinion that this came within the rule, which is followed in Courts of Equity, to strike out beforehand that which is clearly impertinent. In order that it may be

faction of the Court, that that somewhat extraordinary and, it may be, premature step ought to be taken. You cannot anticipate the whole discussion on the materiality of a particular allegation. The materiality of it is a matter which may only come out at the hearing. You cannot anticipate that it is an allegation that should be struck out for impertinence. If there be anything as to which it appears so clear that the Court has no doubt whatever that it cannot enter into its consideration, and that it cannot be allowed to weigh one way or the other in the argument at the proper stage, when the proper stage for consideration arises, then the Court will order it to be struck out.

I listened with great favour towards the argument at first, because I did think it might be said that there was an introduction of another case not before the Court—a case touching the creditors not before the Court, which had only before it the case touching the Crown. If I had been of opinion ultimately that it was so, and that there were two distinct cases not interfering with each other, one of which ought not to have been here, and which was not here, I should have leant towards the argument for striking the allegation—which raised the point in the one case—out of the information, which ought to have been confined to the other. But, looking at the whole, I see no reason to be dissatisfied with the decision of the Master of the Rolls, or of the Lord Chancellor dismissing the appeal from his order.

It will not do to say, because one learned Judge gives one reason for his judgment and another gives another, that that is a reason for a third, namely, the Court of Appeal, taking a third view, and deciding against both. That would be a summary way of getting rid of many cases. Even supposing that the two learned Judges had taken different views, and had arrived at last at the same conclusion by different roads, the two may stand well together; the one dwelling more on one view of the argument than the other. But I see no sort of re-

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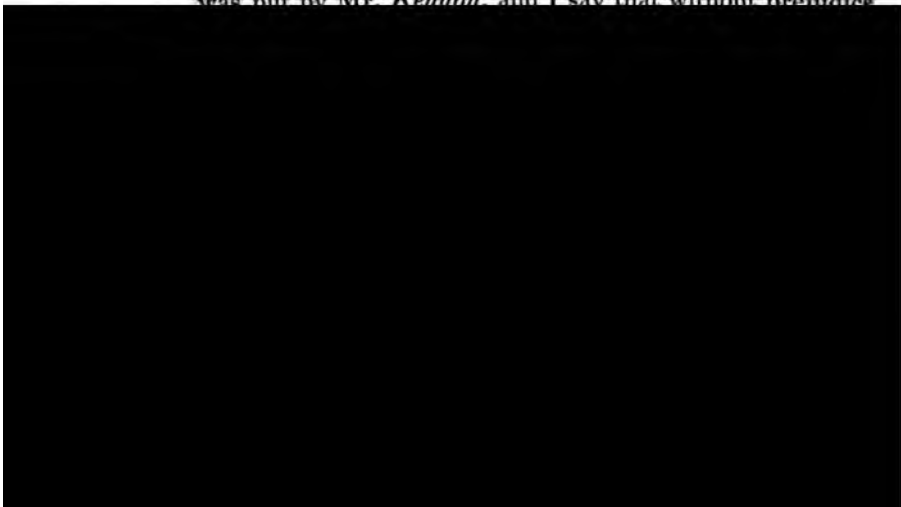
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pugnancy, and even if I did, yet if I am satisfied that they are both consistent in the conclusion to which they come, the one taking the one view, the other the other, the one rather aids the other. Without, therefore, calling upon the respondents, or calling on your Lordships to hear any further argument, I have no hesitation in recommending your Lordships to affirm the order appealed from.

I see no reason for pursuing a different course from what we generally take with respect to the costs. If there are two decisions, one consistent with the other, that appears to me to form a ground for your Lordships abiding by your usual course, when you affirm, of giving the costs of the appeal.

If I thought that the orders below, or the affirmance of them, would introduce any novelty into the practice of the Court in this important matter, I should hesitate very much before I advised your Lordships to affirm them; but upon the best consideration I can give it, I do not think that it will make the least alteration.

Lord Campbell.—After having heard the very able counsel who have addressed your Lordships for the appellants, and who have, each of them, very distinctly and succinctly argued the case—your Lordships will allow me to say I was extremely pleased by the manner in which it was put by Mr. Kenyon, and I say that without prejudice



pertinence. It is a very useful process in a Court of Equity—I should be sorry to see it at all impaired—that, when there are immaterial matters stuck into a pleading, that pleading should be referred to the Master for impertinence, and that the immaterial matter should be struck out. What is to be considered is, whether it be immaterial. If it be material, then the materiality of it must be reserved for the hearing. I think, looking at the face of this information, that it is impossible for us to say that these allegations may not be material. I do not say they are. It will be open for the learned counsel afterwards to contend that they are wholly immaterial; and if that be proved they ought not to have any influence on the decision of the Judge. The first statement excepted to would, I think, hardly be a sufficient ground for the appeal if it stood by itself, namely, the allegation that this bond was assigned to *Stulz* and *Housley*, for the purpose of shewing that they had an interest. It is quite certain that the Attorney General, without any relator, might file his information, and, although a Court of Equity cannot dismiss an information because the relators have no interest, because it is the Attorney General who sues in the name of the Crown, still I cannot accede to what the Lord Chancellor threw out in the Court below. I know from my own experience, from having filled the office of Attorney General a good many years, and having been consulted in a great many of these cases, that Courts of Equity do look to the relators. They do not decide upon the interests of the relators, but in the conduct of the suit they see who the relators are, and make an order that the relators shall pay the costs. And though I do not recollect any particular instance in which they have divided the costs of the suit between the relators and the Crown, I think that would be within the competency of the Court of Equity, if it thought the interests of justice so required. I therefore cannot say that the interest of the relators is so impertinent that that allegation must necessarily be struck out.

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Then as to the other statements, it seems to me there is no pretence for saying that they must be struck out, because I think they may not only be material ; but, without expressing any opinion on it, I think there is a considerable probability that they may be very material. What is it the information asks ? It asks to set aside the deed, so far as the interests of the Crown are concerned, whereby this property was assigned, after a judgment of outlawry had been pronounced, and before the second inquisition. Am I to be told that as far as the interests of the Crown are concerned (because it is to these we are to look) it is *wholly* immaterial what was the consideration for this deed of assignment ? Would it not be material on the part of the defendants to shew that this deed of assignment was in pursuance of a *bonâ fide* contract for valuable consideration, and the full value of the subject-matter conveyed having been paid ? On the contrary, may it not be exceedingly material to shew it was without any consideration ? Nay, it would be very material as far as the Crown is concerned to shew that it was done for a fraudulent purpose—for the purpose of defeating the creditors. I by no means accede to what was so very positively alleged at the bar that the Statute of *Elizabeth*, for the first time, made a voluntary conveyance void, where there is an intention of committing a fraud on creditors. It has been alleged over

Crown on account of the fraudulent purposes of the grantor at the time he executed the deed. It seems to me, therefore, that there is no pretence for saying that these allegations are so clearly immaterial that they must be struck out ; for I can easily imagine that they may be very material at the hearing of the cause.

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For these reasons, I am of opinion that the Master of the Rolls and the Lord Chancellor took correct views of this subject, and that the Master fell into a mistake which has been properly corrected. Therefore, this being an appeal against two successive judgments of Courts that have reversed the decision of the Master, I think we ought to affirm the Lord Chancellor's order with costs.

The Lord Chancellor.—One of the judgments which is the subject of appeal was a judgment delivered by myself; I think it necessary, therefore, to say a few words with respect to it. I adhere to the opinion which I expressed in the Court below. I have had a fuller opportunity of considering the subject by having the printed papers ; and I see no reason to depart from that opinion.

It cannot be objected to this information that it relates the history of the transaction, namely, that Mr. *Egler* was the representative of Mr. *Stulz*, and that he assigned this bond to the two other parties who are relators on the record ; and it appears to me convenient that the nature of that interest should be stated with a view to the point which has been before mentioned, namely, that upon the apportionment of the costs, in case this information should fail, the Court may have an opportunity of making the parties pay the costs who are parties beneficially interested in the property.

Now, with respect to the other part of the case, what is the nature of the transaction ? After the execution of the first inquisition, which inquisition was set aside on a point of form, previously to the second inquisition, this convey-

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ance is made, and it is alleged to have been made with a fraudulent view. Now where there is a fraudulent transaction so stated for the purpose of defeating an instrument, which has been executed with a view and purpose of fraud, is it not proper that all the circumstances connected with the fraud should be stated on the record? And can it be said that any of these circumstances so stated, giving the history of the fraud, are immaterial? Can we, in the first instance, decide that they are immaterial, before the cause comes to a hearing? For it is nothing more than a history of the cause, the manner in which the deed was executed, and the purpose and motive for which it was executed. When we are investigating a fraud, as I think I stated in the Court below, the motives for the fraud are very often a material subject for enquiry. Now the information here assigns two motives for the fraud; it assigns that one motive of the fraud was to defeat the process of the Attorney General; and it assigns that another motive was to defeat the *bond fide* creditors. Actual fraud might be proved on this information, when it came to a hearing—a declaration made by the party, stating that his object was to commit a fraud. Express fraud would vitiate a deed at common law. If a deed was executed with the express object of defeating creditors, it would be a fraudulent act at common law, and would be sufficient to set aside the deed. I apprehend that it cannot be considered

CHARLES HAMMERSLEY - - - *Appellant.*

BARON THOMSON WILLIAM ANDREW

CHARLES DE BIEL, an infant, by } *Respondent.*

W. J. BLAKE, his next friend - }

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A representation made by one party for the purpose of influencing the conduct of another, and acted on by him, will in general be sufficient to entitle him to the assistance of a Court of Equity, for the purpose of realising such representation.

And so in proposals of marriage: if the parent, or his agent, deliberately holds out inducements to the suitor to celebrate the marriage, and he consents and celebrates it, believing it was intended that he should have the benefits so held out to him, a Court of Equity will give effect to the proposals.

Proposals of marriage written by the lady's brothers, acting by her father's authority, stated that "Mr. J. P. T. (the father) also intends to leave a further sum of 10,000*l.* in his will to Miss T., to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father. These are the bases of the arrangement, subject of course, to revision; but they will be sufficient for Baron B. to act upon." Baron B., upon receiving the proposals, provided a jointure as required by them for his intended wife, and then married her. In the settlement, afterwards executed, there was no mention of this sum of 10,000*l.*; and it was not left by J. P. T. in his will:—

Held, that his estate was liable to the payment of the 10,000*l.*, with interest from the end of one year after his death.

Semble, That a letter written and signed by the father, after the marriage, admitting the terms of the written proposals, which were not signed, was a recognition of them as his agreement, and sufficiently signed by him within the Statute of Frauds.

*Marriage
Articles ;
Construction.
Signature ;
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THIS was an appeal from a decree of the Master of the Rolls, and from an order of the Lord Chancellor affirming it. The respondent is the son and only issue of the marriage

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of Baron *William Julius Augustus Henry de Biel*, of *Zierow*, in the Grand Duchy of *Mecklenburgh Schwerin*, and of *Sophia*, late Baroness *de Biel*, who was one of the daughters of *John Poulett Thomson*, late of *Waverley Abbey*, in the County of *Surrey*, esquire, deceased. The appellant is the only surviving executor of Mr. *Thomson's* will; and the object of the suit was to obtain payment out of his assets of a sum of 10,000*l.*, with interest from the time of his death, to which the respondent claimed to be entitled, under the provisions of a memorandum of agreement, hereinafter stated to have been entered into between his father and *Andrew Henry Poulett Thomson*, and *Charles Poulett Thompson*, sons of the said *J. P. Thomson*, on his behalf, previously to the said marriage. The questions for the decision of the House were, whether any such agreement was entered into? and if it was, then what was the construction to be put upon it?

The bill, filed in 1839 against the appellant and the said *A. H.* and *C. Poulett Thomson* (who are both since deceased), stated that Baron *William Julius Augustus Henry de Biel*, the respondent's father, was, in the year 1825, and ever since entitled to a considerable landed estate at *Zierow* aforesaid, which, in the event of his dying without leaving issue, was entailed, according to the law of *Mecklenburgh Schwerin*, on his brother Baron *Gottlieb de*

when he sought his consent to his marriage with the said *Sophia P. Thomson*, did expect that her fortune would be 20,000*l.*: that after *J. P. Thomson* had given his consent to the marriage, some conversation took place between him and Baron *de Biel* respecting the lady's fortune, and the settlements to be made on the marriage, when *J. P. Thomson* requested the Baron to call on his sons, the said *A. H. P. Thomson* and *C. P. Thomson*—who were both, at that time, engaged in business as merchants in *London*—and added that he would forward to them his instructions on the subject: that he, *J. P. Thomson* did accordingly instruct his said sons, and authorised them to act for him, and to enter into the necessary agreement with Baron *de Biel* touching the amount of his daughter's fortune, and the terms and conditions of the settlement to be made on the occasion of the marriage; and that Baron *de Biel* accordingly met them on the 22d of December, 1825, at the house of *C. P. Thomson*, when they produced a letter from *J. P. Thomson*, giving them full power to act for him in relation to the said matters: that at this meeting, after some conversation between *A. H.* and *C. Poulett Thomson* on the one side, and Baron *de Biel* on the other, they came to an agreement, which was reduced into writing, part by *A. H. P. Thomson*, and the rest by *C. P. Thomson*, and the same was as follows:—

“ The arrangement proposed, in case of the marriage of Baron *de Biel* with Miss *Sophia Poulett Thomson*, is as follows, viz:—

“ Mr. *J. P. Thomson* proposes to pay down the sum of 10,000*l.* sterl^s to be secured in the British, French, or other funds that may be agreed upon, in the names of trustees to be chosen, the interest to belong to Baron *Biel*, during the joint lives of himself and Miss *Thomson*, and to her in case of his death before her; the principal to be secured to the children of the marriage, or in case of there being no issue, the survivor to have the interest for life, and the capital to be at the disposition of Baron *Biel*.

“ Baron *Biel* to obtain the means of settling 500*l.* per an., to be

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payable to Miss *Thomson* for life, secured on his estate in *Mecklenburgh*, after his death, in case of her surviving him.

"Mr. *J. P. T.* proposes for the present to allow his daughter 200*l. per an.* for her private use, subject to a possibility of a reduction in that sum in case political or other circumstances should diminish his income; and also intends to leave a further sum of 10,000*l.* in his will to Miss *Thomson*, to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father.

"These are the basis of the arrangements proposed, subject of course to revision, but they will be sufficient for Baron *Biel* to act upon.

"Baron *Biel* should forward as early as possible a joint arrangement for himself and brother, settling 500*l. per an.* on Miss *Thomson*. It is a question, tho' how far that can be given by them without the consent of their heirs, who in case of the death of both, might vitiate it. This point should be decided."

The bill then stated, that *A. H.* and *C. Poulett Thomson* gave the said written agreement to Baron *de Biel*, who accepted the same as binding, both on himself and on *J. P. Thomson*: that the Baron then returned to *Germany*, and as required by the said agreement, executed an instrument in the *German* language, dated the 29th of *January*, 1826, by which he secured out of his said estates to his said intended wife, in case he died before her, leaving children, a yearly jointure of 500*l.*; and about the same time, he prevailed on his brother, the said Baron *Gottlieb de Biel*, to execute a similar instrument for securing the said jointure to Miss *Thomson*, in case the Baron *de Biel* died before her without leaving any children, in which case, as before mentioned, the said estates would have devolved on the Baron *Gottlieb de Biel*: that these two instruments were laid before an advocate at *Hamburgh*, selected by *A. H.* and *C. Poulett Thomson*, and they were settled and approved by the said advocate on behalf of *J. Poulett Thomson*, and were afterwards sent over to this country, and had ever since been in the hands of *A. H.* and *C. Poulett Thomson*: that

shortly afterwards, and before any formal deed of settlement was executed, the Baron *de Biel* and Miss *Thomson* were married in *Dresden*, where Miss *Thomson* was staying with her sister, the wife of Baron *de Maltzahn*: that after their marriage they came to this country, and in consequence of communications between the Baron and *A. H. and C. Poulett Thomson*, who acted in the matter on behalf of their father, respecting the settlement which it had been agreed should be made on the occasion of the said marriage, Messrs. *Dunn* and *Wordsworth*, as the solicitors of the *Thomson* family, were instructed by *A. H. and C. Poulett Thomson* to prepare an indenture of settlement.

The bill then stated the settlement so prepared, dated the 23d of *June*, 1826, and made between *J. P. Thomson* of the first part, *A. H. P. Thomson* and *Charles Hammersley* (the appellant) of the second part, and the Baron *de Biel* and *Sophia* his wife of the third part, whereby *J. P. Thomson* covenanted that he, or his heirs, executors, &c., within twelve months after his death, would pay *A. H. P. Thomson* and *C. Hammersley*, their executors, &c., 10,000*l.*, upon the trusts therein expressed, with interest in the mean time. (No mention was made of the further sum of 10,000*l.*, which the memorandum of agreement stated that Mr. *Thomson* intended to leave by his will to Miss *Thomson* and her children, nor of the jointure of 500*l.* secured to her by the Baron, as before stated.)

The bill next stated that the said indenture of settlement was duly executed by all the parties thereto, but was not previously submitted to or settled by any person, on behalf of the Baron *de Biel* and his wife: that the Baron having noticed that no mention was made therein of the said further sum of 10,000*l.*, which *J. P. Thomson* was to leave by his will, applied to *A. H. P. Thomson* for an explanation of such omission, when he informed the Baron that it would not be proper in point of form, to

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include the same in the indenture: that the Baron not being acquainted with the law of this country, nor assisted by any legal adviser, and having no reason to doubt that the said written agreement would in all respects be faithfully performed, acquiesced in that explanation, and did not take any steps to obtain any further security for such further sum of 10,000*l.*: that at the time of executing the said indenture of settlement, Baron *de Biel* and his wife, at the request of *J. P. Thomson*, executed a deed of release, of even date therewith, by which they released all claims on account of the share of the Baroness as one of the children of *J. P. Thomson*, in a sum of 15,000*l.*, and in a certain bond executed by *J. P. Thomson* previous to his marriage.

The bill stated that the allowance of 200*l.* a year mentioned in the written agreement, was duly paid to the Baroness *de Biel* during her life; that she died in September, 1827, and that her father died in 1838, having by his will given the residue of his personal estate to his sons, and appointed them and the appellant his executors; but that he did not thereby leave the further 10,000*l.* in fulfilment of the promise contained in the said agreement, nor make any provision for paying the same.

The bill in support of the allegations and charges contained in it, set forth a correspondence, which, so far as the same appears to be material, was as follows



all further portion of *Thomson's* mother's fortune had been rescinded after her death. I am naturally anxious for some accurate information on this point, though I think she must have been mistaken, as it does not seem accordant with Mr. *Thomson's* very generous mind thus to make his grandson suffer for the premature death of his mother, when he had already been unfortunate enough to be deprived of her maternal care in his infant years. I feel the more confident of this idea being erroneous, on referring to a joint communication made to me by both you and *Charles*, who, by a letter from Mr. *Thomson*, which you produced to me, were desired and empowered to make a preliminary settlement, which I still possess. You stated in it that 10,000*l.* should be paid down and put into the hands of trustees, and also that Mr. *Thomson* intended leaving his daughter a further sum of 10,000*l.*, to be settled on her and her children, the future disposition of which, supposing she had no children, to be provided by the will of her father. You added, that it would be sufficient for me to act upon. Relying implicitly on the promise of 10,000*l.* being paid down, and a further sum of 10,000*l.* by Mr. *Thomson's* will, I immediately fulfilled my engagement to settle a dowry of 500*l. per annum*, and caused my brother to guarantee it, in case of my death. I was induced to look upon this as a certainty, as most of the sisters of my blessed wife had already received that portion from Mr. *Thomson*, and more especially when I and my blessed wife were asked to give up the claim to 15,000*l.*, which (as I was given to understand) were allotted to every child by Mr. *Thomson's* marriage settlement."

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To that letter Mr. *A. H. P. Thomson* replied by letter, dated 16th *December*, 1833, as follows :—

"On the subject of my father's intended provision for your dear boy *Thomson*, I do not believe he means to leave him more than the 10,000*l.* which was secured to poor *Sophy* and her children by your marriage settlement. I believe it was *his wish and full intention*, when you married first, to make up to *Sophy* 20,000*l. sterling* by a bequest of 10,000*l.* more, in order to make her portion equal to my two eldest sisters; though a part of their fortunes, about 5,000*l.*, consisted of a legacy from my grandfather, who, dying before *Sophy* was born, of course left her nothing. I cannot tell how my father's disposition by will would have been made had my poor sister lived, but I think he would, even in that

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case, not have been able to make good his first intentions, as his own second marriage has abstracted a large sum from what it had been his intention to divide at his death among his children by the first marriage. This, of course, has wholly altered the disposition of his property; and I have reason to think you cannot reckon upon receiving for *Thomson* more than the sum agreed for and reserved by your settlement. You are mistaken if you suppose that you renounced a claim on my father's marriage settlement for 15,000*l.* It was only the ninth portion of that sum, or about 1,600*l.* to which your late wife had a claim; and which claim, in each of the cases of my father's children by his first marriage, was renounced upon their receiving their respective fortunes from my father. In detailing to you my father's intentions with respect to his daughter on or before your marriage, *I only fulfilled his directions*, and I can only regret, of course, that he cannot now fulfil the *promise he then made through me and Charles*, although I am not aware that after the melancholy loss you experienced in the death of poor *Sophy*, he would have felt himself called upon to leave you and your son by her the 10,000*l.*, even if he had not married again, and thereby put it wholly out of his power to do so, which is the case."

After receiving this letter, Baron *de Biel* wrote a letter to *J. P. Thomson*, dated the 30th of *January*, 1834, and which, so far as it is material, was as follows:—

"I have of late written to Mr. *Andrew* on the subject of my boy's future expectations, and it is in consequence of his answer that I venture to write these lines. When I first had the pleasure of being introduced to you at *Waverley* and got your con-

was added that this settlement would be sufficient for me to act upon. Implicitly relying upon that promise, given in your name and by your command, I consented to settle a dowry, almost beyond my means, of 500*l.*, in case of my death, and caused my brother to guarantee it. It is true that when we afterwards came to *London*, we signed our settlement, in which no mention was made of a further sum of 10,000*l.*, but I beg leave to observe that before I did so I spoke on the subject to *Andrew*, who repeated these words to me, that you certainly intended leaving the additional 10,000*l.* to your daughter, but that such a thing could not well be put into a settlement. Having no knowledge of the *English* law, and confiding as thoroughly in the love you bore your daughter, and above all to your generous mind, which even on strangers has conferred such very great kindnesses, I entirely relied on that promise, and not only gave up my claim to having that paragraph put into the settlement, but likewise renounced a claim, which, as far as I was given to understand, your children had to a share in a sum of 15,000*l.*"

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A copy of this letter was sent by the Baron, inclosed in another letter of the same date written by him to *A. H. P. Thomson*, which recapitulated the statements in the three preceding letters. In answer to both these letters *Mr. A. H. P. Thomson* wrote and sent to the Baron a letter, dated the 7th of *February*, 1834, which, so far as it is material, was as follows :—

"I have received your letter to me of the 3^d ult^o with the copy of one you had addressed to my father, which, however, he had previously communicated to me in the original, and which he requested me to answer as from him. I therefore lose no time in stating, in confirmation of what I previously wrote you the 16th *December*, that it is not my father's intention to add by his will the 10,000*l.* legacy to the same sum which, by the settlement made on your lamented wife, my sister, comes to you and your eldest son at his decease. My father regrets much that you should appear so much disappointed on this subject ; but he thinks with me that you had no just reason, under the unfortunate circumstances of my sister's death, to expect the fulfilment of his promise made through *Charles* and myself upon your marriage, because that promise was made and understood to be dependent

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upon poor *Sophy's* surviving my father. I was probably wrong in stating in my last that one chief reason for this legacy not being (as I supposed) intended to be made, was my father's means of providing for his elder children by my mother being curtailed by his second marriage. I only assumed the fact as probable. The above, however, I now give you on my father's authority. At the same time it is agreeable to me to have found, on reminding my brother *Charles* of the communication made by my father through him and me jointly, before or soon after your marriage, that *Charles* agrees distinctly with me in opinion, that the promised legacy could not be due to your child or children by my sister in case of my father surviving her. Had poor *Sophy* lived, I have not the smallest doubt that my father would have fulfilled the intention, *officially declared to you* by *Charles* and myself, of leaving 10,000*l.* to her and her children. The dowry being by her death no longer an obligation on you, it naturally follows that the 10,000*l.* legacy, which you say was the price paid for that dowry, is no longer binding on my father. I shall be very glad to learn that, however disappointed for the sake of *Thomasy* you may be, you acquit my father, as I think upon this explanation you are bound to do, of any intention of not fulfilling his promise given in words as sacredly as if the strongest bond had been executed between you."

The Baron *de Biel*, being in England in *March*, 1835, wrote another letter to *J. P. Thomson*, stating most of the circumstances before stated, and claiming the fulfilment of the promise of the further sum of 10,000*l.*, and in this letter was inclosed a copy of the said written agree-



ment legally implies, in which there appears, as my sons tell me, a considerable difference between the lawyers consulted. It is extremely painful to me, that such a difference should exist, but I wish to keep myself quite clear of the decision."

The bill, after further allegations and charges, prayed that it might be declared that *J. P. Thomson* was, after the death of the Baroness *de Biel*, bound to leave by his will a sum of 10,000*l.* to, or in trust for, the respondent, in addition to the sum of 10,000*l.* secured by the said indenture of settlement; and that the appellant and his co-executors might be decreed to pay the said sum, with interest from the death of *J. P. Thomson*, out of his assets, to some proper person or persons, as trustee or trustees for the respondent.

C. P. Thomson and the appellant by their answer to the bill, (*A. H. P. Thomson* having died before answer,) admitted that the memorandum in question was drawn up at the meeting, as in the bill mentioned; that the annuity of 200*l.*, therein agreed to be paid by *J. P. Thomson*, was regularly paid by him during the life of his daughter; and that the settlement of the jointure of 500*l.* was prepared and executed as stated in the bill. They also admitted the statements in the bill respecting the will of *J. P. Thomson*, and admitted assets sufficient to satisfy the respondent's demand, but they rested their defence to it on three grounds:—first, on the want of authority in the sons to enter into a binding agreement, to the extent of the sum in question, on behalf of their father; 2dly, on the Statute of Frauds; and 3dly, on the construction of the memorandum, contending that it did not, at least as to the sum in question, amount to a binding agreement.

The passages in the answer containing this defence, were to the following effect:—That defendants were ignorant of the particulars of any conversation between *J. P. Thomson* and Baron *de Biel*, respecting the fortune of Miss *Thomson*, except that they believed that he, Mr.

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Thomson did refer the Baron to *C. P.* and *A. H. P. Thomson*, in order to communicate with him on the subject of the arrangement respecting the intended marriage; however, the defendant, *C. P. Thomson*, denied that *J. P. Thomson* instructed or authorized them, or either of them to enter into any agreement with the Baron *de Biel* respecting the fortune of his said daughter, and the terms and conditions of the settlement to be made on the occasion of the said marriage, neither did any letters or letter ever pass between *C. Poulett Thomson* and *A. H. Poulett Thomson*, or either of them, and *J. Poulett Thomson*, though the defendant *C. Poulett Thomson*, conceived it probable that in some conversation with their father he might have desired them to confer with the Baron on the subject, and they, knowing his general intentions and views in reference to the intended marriage, and being fully in his confidence, considered themselves competent to confer with the Baron on the subject of the settlement, but the defendant *C. Poulett Thomson* most positively denied that *J. P. Thomson* ever expressed to him, or, as he believed, to *A. H. P. Thomson*, any intention to settle, or give either of them any authority to bind him to settle upon the said marriage any further sum than 10,000*l.* absolutely, or that he ever contemplated anything beyond it in point of provision, except as to such further provision as he in the exercise of his discretion might be disposed to make by will.

And the defendant, *C. Poulett Thomson*, answering to the best of his knowledge, &c., said that it was not true that he, or *A. H. Poulett Thomson* did at the said meeting, or at any time, produce and shew to the Baron, a letter from *J. P. Thomson*, giving them, or either of them, such authority as in the bill alleged, or any authority whatsoever, or produce and shew any letter from him; and they never had in their or either of their possession, or power, any such letter. And *C. Poulett Thomson* denied that either he or his brother did at that, or at any meeting,

come to any agreement with the Baron, or that any such agreement was reduced into writing ; however, the defendant believed that he and *A. H. P. Thomson*, acting under such impression as to the views and intentions of their father on the subject as aforesaid, did set down in writing, partly by one, and partly by the other of them, what they conceived to be their father's views and intentions in that behalf, and such writing was in the words and figures in the bill stated, but not having retained any copy, did not admit the same as so stated and set forth : however he insisted, that the said writing was not more than a rough sketch or memorandum, not signed by any party ; and they (defendant and his said brother) never gave Baron *de Biel* to understand that they were thereby binding, and never in fact intended to bind *J. P. Thomson* to the terms therein expressed ; and the defendant, *C. P. Thomson*, was confident that it was distinctly explained to the Baron as to the further provision (of 10,000*l.* by will) that the same was to be wholly discretionary ; and no further steps were taken by the Baron in reference to the said memorandum in respect of such further provision, and no claim was ever set up by him or on his part to such further provision until after the death of his said wife. And the defendant referred to the settlement of the 23d June, 1826, executed by the Baron, without any demand being raised on such alleged engagement to settle a further sum of 10,000*l.* as conclusive to establish the true and actual agreement of the parties.

And in reference to the statements in the bill, as to a conversation between *A. H. P. Thomson* and the Baron *de Biel*, at the time of preparing and executing the said settlement, the defendant, *C. P. Thomson*, said he was informed by *A. H. P. Thomson*, and he believed the same to be true, that on such last-mentioned occasion, when the draft of the settlement was read over to the Baron, and with reference thereto, a conversation took place be-

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tween the Baron and *A. H. P. Thomson* on the subject of *J. P. Thomson's* will with reference to a further provision of 10,000*l.*, when *A. H. P. Thomson* expressly stated that such provision was wholly dependent upon the pleasure and discretion of *J. P. Thomson*, and was wholly voluntary, and that consequently it would not be in any way introduced into the settlement, and that the Baron did not set up or assert any right to such provision or insist upon the said memorandum or any agreement in that behalf, or in any way object to, but, on the contrary, fully acquiesced in the propriety of such statement, and the draft was thereupon accordingly completed in conformity with such instructions as to the said sum of 10,000*l.* ; and defendant had been informed and believed, that the said draft was read over to the Baron, who perfectly understood the scope and effect thereof, and some alterations were made therein at his suggestion. And this defendant said that the Baron did not at the time of the execution of the said indenture of settlement produce or make any mention of any agreement or memorandum of proposals for a settlement having been reduced into writing.

The cause being at issue, both the parties adduced evidence. On behalf of the infant respondent his father was examined, and in his evidence he detailed and confirmed most of the statements in the bill respecting the transactions between the *Thomson* family and himself before and after his marriage : and as to the meeting at which the memorandum of proposals was drawn up, he said that *A. H. P. Thomson* produced a letter from his father, and read it, authorising and directing his two sons, *A. H.* and *C. Poulett Thomson*, to treat with him, the Baron, respecting the settlement to be made on his intended marriage with their sister ; and under the circumstances, he fully considered that they had full power

to act for their father in the matter, and that the arrangement, which was reduced into writing by them, was binding on their father and on the Baron, and he, the Baron, acted upon the faith and validity of it in obtaining security for the jointure on his wife. With reference to the conversation at the office of Messrs. *Dunn* and *Wordsworth*, above alluded to, the Baron deposed that on leaving the office, he observed to *A. H. P. Thomson* that the draft of settlement contained no mention of the second 10,000*l.*, which was by the written agreement to be paid at the death of *J. P. Thomson*; upon which *A. H. P. Thomson* replied that it was still his father's intention to leave the Baron's wife this sum at his death, but that such things could not well be introduced into the settlement; and *A. H. P. Thomson* did not upon that or any other occasion state or give him to understand that the second sum of 10,000*l.* was dependent on the pleasure or discretion of *J. P. Thomson*: and he, the Baron, felt quite confident that the agreement of the 22d of *December*, 1825, would be punctually fulfilled in the way in which he understood it: and relying on the agreement and on *A. H. P. Thomson's* statement on that occasion he did not press his objection. The Baron also proved the letters and documents stated in the bill, and also in his cross-examination admitted that he received a letter written to him by *C. P. Thomson*, dated the 31st of *January*, 1826 (*a*).

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(*a*) This letter was in *French*: the following is a correct translation of so much of it as is material here:—

“ I have received a letter, my dear Baron, from your brother, in which he directs me to consent to do what is necessary to secure the widow's jointure of *Sophia*, and informs me that he has sent the necessary papers to *Dresden* to wait for you there: my father has since received a letter from *Sophia*, who informs him of your departure for *Mecklenburg*, so that I fear you have crossed these documents on the road, and that there will still be some delay occasioned by it; however this does not signify, for this is the way

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Mr. *Wordsworth*, the solicitor, examined on behalf of the defendants in the cause, said that on the 20th of June, 1826, he received instructions from *A. H. P. Thomson* to prepare an instrument for vesting 10,000*l.* in trustees for the Baron and Baroness *de Biel* and their children, which sum was to be in full satisfaction of her share in the sum of 15,000*l.*: and that on the 21st of *June*, 1826, the Baron *de Biel* and *A. H. P. Thomson* called on him at his office, and he then read over to them the draft which he had prepared of the proposed settlement, and fully explained the effect of it, and the Baron, who spoke and understood the English language extremely well, clearly and perfectly understood it, and he and the Baron had a long conversation upon several of the clauses, and on that occasion he made several alterations in the draft, by the joint direction of the Baron and *A. H. P. Thomson*, particularly to vest the 10,000*l.* in the Baron abso-

in which my father thinks it will be best to arrange the matter, a method which I hope will put an end to every possible delay, although it is perhaps not so quick as the betrothed parties wish. One of our friends, Mr. *Gossler*, senator of *Hamburgh*, will take upon him to appoint an advocate, who will arrange with yours and your brothers the documents which are necessary to secure the widow's jointure to *Sophia*. For this purpose my brother has written to him to-day, and given him the required particulars. As soon as the lawyers shall have arranged the ne-

lutely in default of children, instead of giving the Baroness the power of appointment thereof by will, as he had then prepared the draft, and to introduce a power for the trustees to lay out the trust fund in foreign securities; and he and the Baron also conferred on the right of the Baroness to one-ninth part of the said sum of 15,000*l.* under the marriage bond of her father in default of appointment by him, when the Baron said that he had clearly understood that all claim in respect of the bond was covered by the said 10,000*l.*, and he desired that the witness would prepare a deed to release the same; which deed of release the witness accordingly prepared, conceiving himself as acting for and on behalf of the Baron, as well as for *J. P. Thomson*, as the family solicitor; and accordingly such indenture of release of even date with the indenture of settlement was prepared, and executed by the Baron and his wife, by which they released all claims and demands on account of her share and interest in the said 15,000*l.*

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The cause was heard by the Master of the Rolls, and on the 19th of *February*, 1840, his Lordship decreed that the defendants, *C. P. Thomson* and the appellant, as the executors of the will of *J. Poulett Thomson*, should pay into the Bank to the credit of the cause the sum of 10,000*l.*, together with interest thereon at the rate of 4*l.* *per cent. per annum*, from the end of one year after *J. P. Thomson's* death (*b*).

An appeal against that decree was heard by Lord *Cottenham*, (Chancellor,) in *May*, 1841, and his Lordship made an order the 6th of *August*, affirming the decree and dismissing the appeal with costs (*c*). Soon after that

(*b*) See 3 Beav. 469.

(*c*) The case on that appeal is not reported. The following note of the Lord Chancellor's judgment was printed with the appeal case, and admitted by the counsel on both sides to be correct:—

*The Lord Chancellor (Lord Cottenham).—*Of the three points

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order *C. P. Thomson* (then recently created Lord *Sydenham*) died.

Against the said decree and the order affirming it, the present appeal was brought by the surviving executor and defendant.

Mr. *Anderdon*, for the appellant.—The written memorandum was no more than a rough sketch of proposals,

relied on by the appellants as the ground of their resistance to the claim of the plaintiff, I propose, *first*, to consider whether there was any such agreement previous to the marriage of the plaintiff's father and mother as was binding on the late Mr. *Thomson* to give an additional 10,000*l.* as the portion of his daughter. If it be supposed to be necessary for this purpose to find a contract, such as usually accompanies transactions of importance in the pecuniary affairs of mankind, there may not be found in the memorandum, or in the other evidence in the cause, proof of any such contract; and this may have led to the defence set up by the defendants; but when the authorities on this subject are attended to, it will be found that no such formal contract is required. A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will in general be sufficient to entitle him to the assistance of this Court for the purpose of realizing such representation. Of this, *Hodgson v. Hutchenson*,^a *Cookes v. Mascal*,^b and *Wankford v. Fotherley*,^c which last case was affirmed by the House of Lords, afford strong instances. In *Luders v. Anstey*,^d a suggestion for consideration, followed by marriage, was held to be

expressly subject to revision. That revision took place upon the preparation of the indenture of settlement, which the Baron *de Biel* executed without requiring any covenant for securing the second sum of 10,000*l.* to be inserted, treating that sum as quite voluntary and dependent on

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of her surviving her husband. This was done, and the marriage took place, of which the plaintiff was the only issue. Some of the subsequent letters of Mr. *Andrew Thomson* suggest that the second 10,00*l.* was only to be paid in the event of the daughter surviving the father, which did not happen; but the father in his letter to the surviving husband of his daughter puts the case on its true footing in saying "The only question is now, I conceive, what the expression used in the engagement legally implies." I am of opinion, upon the authority of the cases before referred to, that the expressions used in the proposed arrangement, acted on as they were, became obligatory on the party on whose behalf the proposition was made.

But, *secondly*, it was contended that the provisions of the Statute of Frauds furnish a defence to the claim founded on this agreement. Assuming for the present that the two brothers of the intended wife were duly authorized by the father to enter into the arrangement with the intended husband, the document to which I have referred, containing the proposed arrangement, proves that both concurred in what that paper contains; for it is written partly by one and partly by the other, and the father's name is in one place written at length by one son, and in the other by initials only, by the other son; and as it is clearly immaterial in what place the signature of the name is to be found, it is, in the terms of the Statute of Frauds, an agreement made in consideration of marriage, of which there is a memorandum or note in writing signed by a person thereunto lawfully authorized by the party to be charged therewith. An auctioneer, whose signature is sufficient within the Statute, signs the name of the principal. Independently, however, of this, there is the letter of the father signed by himself, in which he, referring to this document, says, "the only question now is, I conceive, what the expression used in the engagement legally implies,"—by which he must be understood to mean, that if the expression used amounted to an obligation to pay the additional 10,000*l.*, he was

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the circumstances and discretion of Mr. *John Poulett Thomson* at the time of his death. It was in that sense only that this part of the proposals was understood as well by the Baron himself, as by *Andrew Henry* and *Charles Poulett Thomson*. They had no authority from their father to enter into any contract to bind him absolutely to leave by his will this sum to his daughter and

ready to perform it. I am aware that in *Randall v. Morgan*,^c Sir *W. Grant* suggests a doubt, whether a written promise after marriage to perform a parol agreement made before could be enforced; but in *Hodgson v. Hutchenson*,^d *Taylor v. Beech*,^e and *Mountague v. Maxwell*,^h it was held that such a subsequent written promise would be binding within the statute. This case does not rest solely on that ground, for though it has been decided that a marriage is not *per se* a part performance of a parol agreement, so as to take the case out of the statute, there was in the dealing between these parties an important act by the intended husband in execution of the proposed arrangement. He was informed by it that the arrangement proposed would be sufficient for him to act upon, and that he should forward, as early as possible, a joint engagement for himself and his brother, settling 500*l.* a year on the intended wife, which was done. I am, therefore, of opinion that the Statute of Frauds does not afford any defence against the claim of the infant.

But, *thirdly*, it was argued that the two brothers of the intended wife had no authority to enter into this arrangement. In the letters of 16th *December*, 1833, and 7th *February*, 1834, of

her family. The judgment of the Master of the Rolls (*d*) proceeds upon a supposed letter of the father to his sons, authorising them, as his agents, to enter into the agreement. No such letter has been produced, nor did any such ever exist. The agency must be established before the terms of the agreement can be taken into consideration; *Howard v. Braithwaite* (*e*).

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The alleged agreement is not signed by any one. The name of *J. P. Thomson* appears twice in the body of it, but as it was not signed by him nor by his authorised agents, it is not an agreement binding on him within the Statute of Frauds (*f*); *Propert v. Parker* (*g*). In the case of *Montgomery v. Reilly* (*h*), Lord Eldon considered it very difficult to decide—and his Lordship, in fact, did not decide—that a letter written to a friend by a party proposing terms in reference to his sister's marriage, could be enforced as an agreement entered into by him, in consideration of the marriage:—

Lord Campbell.—The actual celebration of the marriage in the present case was not a sufficient consideration for this second sum of 10,000*l*.

The Lord Chancellor.—What do you say to the jointure of 500*l*.? Was not that a part performance and

a conclusive on this point is the letter of the father himself, who, not disputing the authority under which the engagement was made, says the whole question depends on its construction.

It was said that the settlement was silent as to this second 10,000*l*., but it is in proof, that, on the plaintiff's father observing this, Mr. *Andrew Thomson* answered him, by saying "that such things could not be well introduced into the settlement."

I am for these reasons of opinion, that all the three grounds of defence fail, and that the petition of appeal must be dismissed with costs.

(*d*) 3 Beav. 470.

(*g*) 1 Russ. & M. 625.

(*e*) 1 Ves. & B. 202.

(*h*) 1 Bligh. 364, N. S.; 1

(*f*) 29 Car. 2, c. 3.

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consideration? Was not the Baron *de Biel* influenced in making that provision by the representations contained in the written memorandum?

Mr. *Anderdon*.—Lord *Cottenham's* judgment proceeded on that view, but the cases on which his Lordship relied (*i*) will be found, upon examination, not to apply to this. His Lordship put the question for his decision upon three grounds, namely, agreement, recognition of it by Mr. *Thomson* in his letter of 1835, and part performance upon representations, constituting equitable consideration. The case of *O'Reilly v. Thompson* (*k*) shews what sort of part performance is sufficient to meet the plea of the Statute of Frauds:—

Lord *Campbell*.—If a father says to a suitor, “If you marry my daughter, and settle so much a-year on her for her jointure, I will give so much for her portion:” would not that proposal be a good contract if the marriage takes place, and the jointure is settled?

Lord *Brougham*.—A case of that sort came before Lord *Eldon* and myself here; it was *Logan v. Wienholt* (*l*).

Mr. *Anderdon*.—Certainly, and specific performance was enforced. Representations by one party, inducing acts by the other, would give a right to specific performance; *Wankford v. Fortherley* (*m*). But the real inducement and consideration for the marriage and for the jointure in this case, were the first sum of 10,000*l.*, which was accord-

him ten years after was not a recognition of it, so as to validate an agreement which was before invalid. In all cases where the signature to a letter of any agreeing party has been held to be a signature within the meaning of the Statute of Frauds, the person signing the letter was admitting the fact that he had entered into the agreement referred to in the letter; whereas, this letter shows that Mr. *J. Poulett Thomson* had no intention to admit that any agreement had been entered into, or to admit a liability which had not previously existed. It is also to be remembered, that this letter was written after the subject had become matter of contest between the parties. The memorandum is not by legal evidence so connected with the letter as to constitute the signature to that letter a signature to the memorandum. A subsequent recognition of an agreement by writing, signed by a party, cannot create any new obligation, or give effect to such agreement, which was actually null and void under the statute. The case of *Luders v. Anstey* (n), cited in the Courts below, does not apply here; and *Cookes v. Mascall* (o), also cited there, is not law.

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Mr. *Fitzroy Kelly* on the same side.—The representatives of Mr. *J. Poulett Thomson* resist this claim, not on any technical grounds, but because they sincerely believe that it was not his intention to give his daughter, the Baroness *de Biel*, the second 10,000*l.* The sons denied, as appears by the answer to the bill, that they had any authority from their father to promise that sum:—

The Lord Chancellor.—What the answer says is, that they had no direct authority from the father to offer the second sum of 10,000*l.*, but they promised it for him in accordance with what they knew to be his intention.


Mr. *Kelly*.—It may be assumed that they promised it, and

(n) 4 Ves. 501.

(o) 2 Vern. 200.

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that they had their father's authority to write the whole of the instrument, and therefore, without recourse being had to the benefit of the Statute of Frauds, this instrument is submitted to the construction of the House upon the evidence in the cause. It purports to be no more than a preliminary arrangement, being expressly "subject to revision." That the arrangement was never intended by the *Thomsons* to be conclusive, appears evident from Mr. *C. Poulett Thomson's* letter of the 31st of *January*, 1826, to the Baron (*supra*, p. 60, n.) informing him that, as soon as the necessary papers should be ready, Miss *Thomson's* marriage contract would be sent to him "for your signature and her's, *for this document must positively be signed by both of you before the ceremony; without this, it is void according to our laws.*" In defiance of this advice and prohibition, the Baron married the lady before the settlement was executed, and by that hasty act he deprived Mr. *Thomson* of all power of revising the proposals, and released him from all obligation to make any settlement, at least a settlement of this second 10,000*l.* The settlement, however, was afterwards made, such as Mr. *Thomson* wished, disposing of the first sum of 10,000*l.*, omitting altogether the mention even of the second 10,000*l.*, which alone is now in question. It is my duty, without reference to the wishes of the *Thomson* family, to submit that, even if



or other circumstances should diminish his income, and also *intends* to leave a further sum of 10,000*l.* in his will to Miss *Thomson*, to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father. These are the basis of the arrangements proposed, *subject, of course, to revision,*" &c. How can it be maintained that this was a binding contract? Do not the terms of it import, even make it manifest, that the parties contemplated a reconsideration of the proposals, and reserved a power of revision, as indispensably necessary before marriage? and no doubt such a revision of them would have taken place, had not the Baron made that impossible by the premature marriage. Had he delayed his marriage, as advised by Mr. *C. P. Thomson's* letter, this litigation would not have arisen, as Mr. *Thomson* would have an opportunity of revising the proposals, and giving his reasons for not fulfilling the intentions ascribed to him as to this second 10,000*l.* The question now turning on the strictly legal rights of the parties, it is submitted as an undoubted proposition that Mr. *J. P. Thomson* was not under any legal obligation, in pursuance of those proposals, to make any settlement of the marriage under the circumstances that took place. As to him, a person engaged in commercial business, a settlement after the marriage would be very different from a settlement before the marriage; and, as a point of clear law, it is submitted that a settlement before the marriage would be a condition precedent to any obligation attaching on him to pay this second 10,000*l.*, and he was altogether released by the Baron's non-compliance with the preliminary condition:—

The Lord Chancellor.—Would not a Court of Equity enforce the execution of a settlement after marriage, in pursuance of proposals or contract entered into before marriage?

Mr. *Kelly.*—Certainly; but if Mr. *Thomson* desired

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the settlement to be executed before the marriage, in pursuance of the contract, and the Baron refused, was not Mr. *Thomson* released? That, in fact, is the question in this case. The Baron was cautioned not to marry until the settlement was executed; but he, in defiance of that prohibition, married before settlement. Is it to go forth that a suitor, having got an intimation of a man's intentions respecting his daughter's fortune, is to take and marry the lady in defiance of her father and family?

Lord *Campbell*.—Surely that question does not arise here—is it not an unnecessary apprehension?

Mr. *Kelly*.—There can be no doubt that this case gives rise to the apprehension; and ought it to go forth on the authority of this House that, when a father enters into a contract for the marriage of his daughter, subject to revision, and with a prohibition against marriage until after settlement, the suitor, having got the contract, may take the daughter and marry her before the settlement? If he may, what a position will parents and families be placed in? If the Baron had come over previous to the marriage, to get the contract effected by settlement, and insisted on this second sum of 10,000*l.* being inserted in it, Mr. *Thomson* might have said, “No, I reserved to myself power to revise the contract, and I do now revise it as to that sum: circumstances have occurred to make me withhold that

the birth of children, would not a Court of Equity compel execution of a settlement in pursuance of the contract? It happens frequently that parties marry, relying on the faith of articles.

Mr. Kelly.—The father here had a power of revision of the contract down to the moment of executing the settlement, and then he exercised the power, the Baron having, by his hasty marriage, contrary to the warning by *Mr. C. P. Thomson's* letter, prevented revision before the marriage. It is on the impossibility of revising the contract until after the marriage that the argument is rested.

The Lord Chancellor.—There was not any expression of intention or wish to alter the contract: it was an after-thought. It must be remembered also that the power of revision was mutual, and that *Mr. Thomson* could not exercise it in the absence of the other party.

Mr. Kelly.—Certainly: and if the Baron objected to the alteration or omission, the contract could not be executed. Is it competent to a suitor, upon a preliminary contract for marriage, to take and marry the lady, and fasten the contract on the parent? Is it to be held that a contract of this sort is a licence to marry without settlement, and that, by the suitor's wrongful act, the parent is deprived of the power which he had reserved of revising the contract? The power of revision would be perfectly nugatory. This case, under the circumstances, must be taken as if the settlement was executed before the marriage, and the father had, at the execution of it, exercised his power of revision:—

The Lord Chancellor.—There was no revision at the execution of the settlement. The second sum of 10,000*l.* could not be inserted, because it was to be left by will, and in respect to that sum the previous articles co-exist with the executed settlement.

Mr. Kelly.—The settlement having been executed by the Baron deliberately, without the least imputation of

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fraud or coercion, what right has he or his son now to set that solemn instrument aside, and substitute for it the rough proposals which formed the basis of the settlement? The Baron, in his evidence says that, after hearing the draft of the settlement read, he did object to the omission of the mention of that sum, but that *Andrew Thomson* said, though it could not be put into the settlement, it was still his father's intention to leave it by his will. The answer puts a different aspect on the conversation, and Mr. *Wordsworth*, who acted as solicitor for all parties, has no recollection of the matter.

It is said that Mr. *J. P. Thomson's* letter to the Baron in 1835 amounts to a recognition of the promise in the proposals. His meaning evidently was this—"you call my attention to a clause in the proposals about a legacy of 10,000*l.*, my impression is that I left that open to revision." He more repels than admits the inference that is sought to be made, and leaves it to be dealt with by the lawyers. It is now immaterial what his opinion was at the time he wrote the letter. The question now is, what construction is to be put on the terms of the proposals. The word "intend," especially by will, is revocable, the whole will being revocable. In *Logan v. Wienholt*, before referred to, there was a binding agreement to leave so much by will, not depending on intention or circumstances, as in this case:



not signed by the party sought to be charged therewith, nor by his authorised agents. (The learned counsel argued for some time upon the application of the Statute of Frauds, and cited several cases, but seeing a strong inclination of opinion against him, he, after conferring with Mr. *Anderdon* and with the agent, said, he had thought it his duty to urge that defence, but his friends did not wish it; he, therefore, relied on the construction which he had suggested to be put on the written memorandum.)

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Mr. *G. Turner* and Mr. *Phillips* appeared for the respondent, but were not called on.

The Lord Chancellor.—We have attended most carefully to the very able arguments of the learned counsel who have addressed us, but as we have formed a clear opinion on the case, we do not think it necessary to trouble the counsel for the respondent.

Mr. *Andrew Thomson* and Mr. *Charles Thomson*, by the authority given to them by their father—which, after his letter (p), I think, cannot now be disputed—entered into an arrangement for a marriage between their sister and the Baron *de Biel*, the terms of which arrangement have been stated to your Lordships. It is quite impossible, after the letter to which I have referred, for a moment to consider that that arrangement was not entered into by the father's authority. But reliance had been placed—and that has been the principal argument on the part of the appellant—upon certain words in that arrangement, by which it is stated “to be subject, of course, to revision,” but in the mean time that it is “sufficient for the Baron *de Biel* to act upon.”

Now, it is to be observed that there was no stipulation

(p) *Supra*, p. 54.

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whatever as to the time when the marriage was to take place. It, in fact, did not take place till six or seven weeks after the arrangement had been entered into. During the whole of that time no intimation was given, either on the part of the brothers or of the father, that they desired any revision of this agreement, that they desired any alteration whatever to be made in it; there was no suggestion or intimation of that kind; and, under these circumstances, after the lapse of six or seven weeks, the marriage took place.

It is stated that a letter was written by Mr. *Andrew Thomson*, as it is suggested, by the authority of the father, to the Baron *de Biel*, telling him not to celebrate the marriage until after the settlement had been executed (*q*), and from that it is assumed that it was a wrongful act on the part of the Baron *de Biel* and of the daughter to celebrate that marriage before the settlement had been actually executed. Now, when you come to consider that letter, it amounts to nothing more than this:—the writer states, “no doubt you are very impatient to marry; you will think the interval tedious; but you will recollect that, until the settlements are executed, if you marry before their execution, they will, by the law of *England*, be altogether void.” There was no intimation whatever in that letter that the father wished to depart from the agreement

but the sole object of the letter was to

pears to have been mistaken. I do not, under these circumstances, apprehend that that letter can possibly have any weight in this case.

Then, after the marriage took place, did the father complain that no opportunity had been afforded for revision? Did he suggest that he wished any alteration to be made in the terms of the settlement? Was there any admission of that kind? Did he complain that the marriage had been celebrated at too early a period? Nothing of the kind. The parties came over to this country; they were well received by the father, and preparations were made for executing the settlement, and it does not appear that the slightest complaint was made during that interval as to the time when the marriage was celebrated, or as to their having anticipated the execution of the settlement, nor any intimation whatever that the parties desired any change or alteration in the settlement in pursuance of that reservation of a power of revision, upon which so much observation has been made.

Now then as to the settlement itself, and the transaction which took place: the draft was prepared by Mr. *Wordsworth* and his partner. The parties met at the house of the solicitor, for the purpose of approving of the draft. The parties who so met were the Baron *de Biel* and Mr. *Andrew Thomson*. The draft was read over, and much canvassed and considered. It related only to the settlement of the first 10,000*l.* Attention was only directed to that subject; but after the terms had been so settled with respect to that sum, with the entire approbation of both parties, then a conversation took place between the Baron *de Biel* and Mr. *Andrew Thomson*, which has been referred to in the course of the argument. That conversation related to the 10,000*l.* that was to be settled by the will. The Baron *de Biel* said "no notice has been taken of that 10,000*l.*" This is the distinct evidence that he has given in the cause. This is stated, and repeatedly

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stated in the letters that he wrote upon the subject. He said that, as he was coming away from Mr. *Wordsworth's*, in conversation with Mr. *Andrew Thomson*, and having stated that there was no notice taken of the 10,000*l.* which was to be settled by the will, Mr. *Andrew Thomson* said his father's intentions were still the same, there had been no alteration of any intention, but that such a matter could not be well introduced into the settlement; and the gentleman (Baron *de Biel*) says that, "being unacquainted with the laws of *England*, he took for granted that Mr. *Thomson* was right, and he did not press the matter further." That accounts, therefore, for this part of the arrangement not having been introduced into the settlement. I do not find any contradiction of this statement; on the contrary, it is rather confirmed by the testimony of Mr. *Wordsworth*. Supposing there was a competition between the evidence of those two gentlemen, what are the circumstances of the case, and upon whose evidence would your Lordships be most disposed to rely? It is quite clear that the Baron *de Biel* had his attention directed to the subject; he was one of the parties to the conversation. Mr. *Wordsworth* says he did not hear what passed from the Baron *de Biel*; or if he did hear it, he heard it so imperfectly that he can give no account of it: he recollected part of the reply made by Mr. *Andrew Thomson*, but he goes on and says that it made no impression upon

plaint was made by Mr. *Andrew Thomson*. If he had thought there was some just ground of complaint of that fact, the moment the Baron *de Biel* had said, "the 10,000*l.* to be provided for by the will are not included in the settlement," he would have said immediately, "Why, by your marriage you have prevented the alteration that my father meant to make in the arrangement;" but no intimation of that kind was given, and I am quite satisfied, from all the circumstances of the case, that there never was any intention on the part of the father to make any alteration in the terms of the settlement, but that the settlement itself, the agreement entered into, or rather the proposition made by the two brothers, was throughout to be the basis of the settlement.

If that be so, then we are brought to the consideration of the effect of that arrangement. And what does the father say in his letter(*r*)? He brings it to that very point. He does not make any of those points which have been urged at the bar, but, after considering the subject, and reviving his recollection by looking at the copy of the agreement, he says he conceives it must be settled according to the legal import of the terms that are contained in the agreement; and he puts it upon that, and he acquiesces in it. He seems disposed to assent to whatever is the legal interpretation of these expressions, and feels that he is bound by them.

Then what is the legal effect of those expressions? For myself, I cannot entertain any doubt with regard to the legal effect of them. In the first place, what does the instrument purport to be? It is not a loose arrangement, but it is an arrangement entered into apparently with much consideration. It says, "The arrangement proposed in the case of the marriage of the Baron *de Biel* with Miss *Sophia Poulett Thomson* is as follows."

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(*r*) *Supra*, pp. 59 and 60, note.

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Then the parties go on to state what the arrangement is to be, and they come at last to this particular: "Mr. *John Poulett Thomson* also intends to leave a further sum of 10,000*l.* in his will to Miss *Thomson*, to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father. These are the basis of the arrangement proposed, subject, of course, to revision, but they will be sufficient for Baron *de Biel* to act upon." The instrument begins by stating that these are the proposed arrangements, and, after stating the intention with respect to the will, it concludes by stating, that what has been previously stated is the basis of the arrangements, in case of the marriage taking place.

How is it possible for a moment to consider that this was not to be regarded as a substantial part of the arrangement, that was to influence the Baron, to operate upon his mind, and to induce him to form this alliance with the daughter of Mr. *Thomson*? He does not say merely that he intends to settle 10,000*l.* by his will, but he points out the particular form of that settlement, the manner in which it is to be arranged, and eventually, in case there should be no children, that then he shall have the power by his will of disposing of the property. Does that look like a mere voluntary act, which was not at all to be obliga-

tionary upon him? Why was all that arrangement set out

marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a Court of Equity will take care that he is not disappointed, and will give effect to the proposal. This is stated as a part of the arrangement; it is stated as the proposal.

Under these circumstances, according to the authorities that were referred to in the judgments of the learned Judges in the Courts below, I conceive this case comes clearly and distinctly within the principle to which I have referred. It is impossible to say for a moment that it was not held out to the Baron *de Biel* as a part of this arrangement, that 10,000*l.* should be left by will for the purpose of being settled upon the children of this marriage. It is impossible to suppose for a moment that that did not operate upon the mind of the Baron, and induce him, with reference also to the other provisions contained in this instrument, to celebrate the marriage; and I am sure, under these circumstances, your Lordships will see the propriety and equity of giving effect to those expectations.

Upon these grounds, my Lords, it is that the judgment below was pronounced; and upon these grounds, I think it may satisfactorily be rested, and therefore I recommend your Lordships to affirm the judgment of the Court below.

I say nothing upon the Statute of Frauds, because I understand that that objection has been distinctly abandoned by the learned counsel; therefore that objection being out of the way, the case rests upon the principles which I have stated, and upon these principles I think it ought to be decided.

Lord *Brougham*.—I entirely agree with my noble and learned friend in the view which he has so accurately and so luminously taken of this case. I certainly was one of those who thought it unnecessary to trouble the counsel

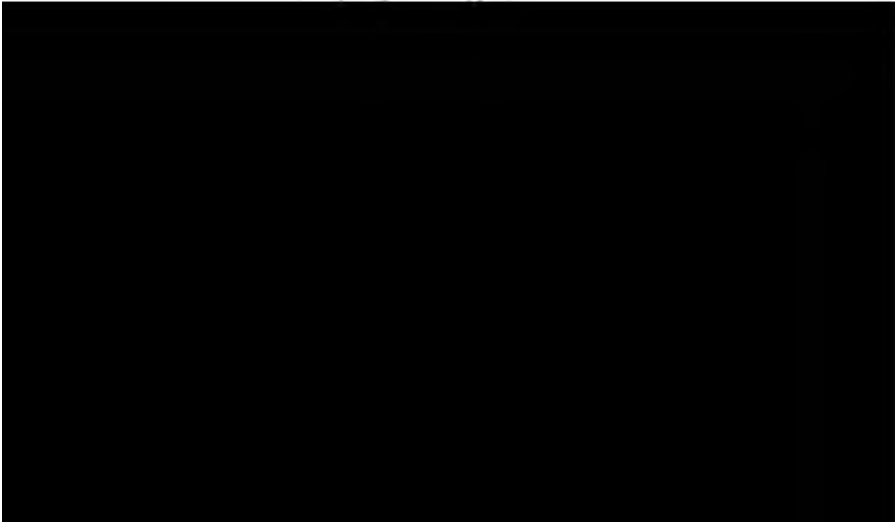
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for the respondent to address us, in answer to the able arguments which both the learned counsel have presented on the part of the appellant. With every anxiety that a case of such importance should be fully considered, I thought it was not required.

The question which was raised below, and, to a certain degree, argued by both the learned counsel here, until very late in the day,—as to the effect of the Statute of Frauds—is now out of the field, which I am exceedingly glad of, as the case is relieved of a considerable degree, rather of length than of difficulty, inasmuch as I have no doubt whatever, upon looking into it, as to how that point ought to be disposed of.

The case then rests entirely upon the ground upon which it is material to consider that Mr. *John Poulett Thomson* himself rested it in his letter of the 30th of April, 1835, nine years and a half after the memorandum, amounting, as we hold, and as has been held below, to a contract; I am, therefore, to deal with the case as if the authority of Messrs. *Andrew Henry Thomson* and *Charles Poulett Thomson*, were admitted, it having thus been proved by the adoption of the father, with the memorandum or a copy of it before him, the existence of which memorandum he had not forgotten, though he may have forgotten, as he says, the particular expressions in it. I



himself at the Bar, arguing his own case, and saying, "I admit the authority, I admit the execution of that power given by me to my two sons, but I call upon your Lordships to give judgment in my favour, upon the legal import and effect of that instrument, which they so by me authorized did, under my instructions, execute." That is the point upon which we are now to consider this case—as if Mr. *Thomson* were here demurring in point of law to the construction put by the Court below upon the instrument in question, but giving up all other objections in the case.

Now it is very much to be considered (and I the more call your Lordships' attention to this point, because it has not yet been brought to our attention, although we should have had it probably from the other side), it is very much to be considered in what way Mr. *J. P. Thomson* states this; for I am by no means clear that, if the obvious mistake, into which he falls in his recollection of the purport of the instrument, had been removed, and if his mind had been cleared up upon that point, he would not have said there is an end to the question. Suppose he was here, and he had just repeated here what he says in his letter of the 30th of *April*, 1835; suppose he had said, "The impression on my mind was that I had left it open to revision." Oh! but a marriage took place, says Mr. *Kelly*, (which Mr. *Thomson* would not have said) and that prevented the revision. He goes on, clearly showing that he was under a total misapprehension of what it was; he says, "The impression on my mind was that I had left it open to revision in case of a change of circumstances." If he had left it open to revision "in case of a change of circumstances," a question might arise whether he would not be right in his contention here. I do not say how I should dispose of it, if that question might be raised; but that is a total mistake: he had not left it open to revision, *in case of a change of circumstances*. The fact is that he is confounding the 10,000*l.* with

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the 200*l.* a-year. If your Lordships will observe, the allowance of 200*l.* a-year is left open to revision, "in case of a change of circumstances," because Mr. *Thomson* says, "I propose, for the present, to allow 200*l.* *per annum*, subject to the possibility of a reduction in that sum in case political or other circumstances should diminish my income." But where is there a word to be found about any change of circumstances to affect the disposition of the 10,000*l.*? There is nothing of the kind; it is confined to the 200*l.* But Mr. *Thomson*, at a distance of nine years afterwards, and at his age, and not having till lately seen a copy of it, had an inaccurate recollection, nay, an inaccurate perusal of it, (because the copy was before him); he confounded the two; he applied the words, "change of circumstances," which, in the instrument executed on his behalf by his sons, are confined to the 200*l.*, which was clearly optional and only a present provision; he applied that expression to the 10,000*l.* I have looked in vain; (I shall be glad to be corrected if I am wrong, for it weighs very much upon my mind in disposing of this case) I have looked in vain through that instrument of the 22d of *December*, 1825, to find any word or any reference whatever to a change of circumstances, as affecting the 10,000*l.* All that I can find with reference to that 10,000*l.* is of a totally different nature. That sum of 10,000*l.* was to be "settled on her and her children, the disposition of which, supposing she has

"It was a part of my arrangement that I was to have the benefit of a power of revision in case of a change of circumstances." But I should say to him: "No, Mr. *Thomson*, please to look at what your sons signed for you, and you will find you are mistaken; there is not a word about change of circumstances, there is only "subject to revision." "Change of circumstances, I am sure," he would have said, "is in the instrument." Yes, I should have replied to him; but look, you will find that you are confounding the two parts of the instrument together, the change of circumstances applies to the 200*l.*; but it does not apply to the 10,000*l.* at all. "I see," he would have said, "that I have totally mistaken: I am entirely wrong: my argument went upon a false impression on the point. I see clearly now that there is not a word about change of circumstances, but only subject to revision."

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My Lords, I have thought it right to state what I have stated on this point, because it is one which had not hitherto been brought to our attention: the counsel for the appellant had no interest in bringing it before us. I am now to consider whether these words, "subject, of course, to revision," would make any difference; and I am clearly of opinion with the Master of the Rolls, and I concur in what he states upon that subject, and which is stated by him so clearly, that I prefer his language to my own. He says most accurately (*s*), "Until Baron *de Biel* had performed his part, and prior to the marriage, the whole was to be subject to revision, but no revision took place. The proposals and intention thus expressed remained without any alteration whatever up to the time of the marriage, and I am of opinion (in which I entirely agree,) that the proposals, which up to that time had been subject to revision, did then, by the acceptance of the Baron *de Biel*, by his due execution of the required settlement on his part, and by the solemnization of the mar-

(*s*) 3 Beav. 478.

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riage, with the approbation of Mr. *Thomson*, become an agreement (according to all the cases), which Mr. *Thomson* was bound specifically to perform."

My noble and learned friend has so fully pointed out the grounds upon which this is to be taken as an agreement within all the cases, and according to the fundamental and undoubted principles on which Courts of Equity have always acted in this country, that I have no occasion to go further into that branch of the case, having relied more upon that point which had not been previously remarked upon. But it is to be observed that this was an act of a very formal nature, and not a loose and casual arrangement; and when we have been pressed by the learned counsel with the argument, which no doubt has its foundation in fact, I agree that these are the things which are very commonly said when suitors come for a man's daughters, or nieces, or wards, or persons under their parental care, "I will give so much," or, "I will settle so much, and, besides that, you will take into your account that she may be better off at my death." That, no doubt, is very often said, but is it common to put it into writing? On the contrary, if a suitor were to say, "Will you have the goodness just to put the last part of your kind observation down into writing," the old gentleman would say, "Oh, no! I do not mean to bind myself."

But here he has bound himself—he does put it into writing.

case of her having children ; and secondly, providing for the case of her not having children. In case of her having children, what is to be done with it ? It is to be settled on her and her children. In case of her not having children, what is to be done with it ? The disposition will be prescribed by the will of her father, so that he provides, most distinctly and clearly, first, for the event of her having children, in which case it is to be settled on her children ; and secondly, for the case of her not having children. Now as to the case which was put by Mr. *Kelly*, and pressed upon us strongly, of persons saying vaguely, "I intend so and so ; I do not bind myself, but I intend to do so and so ;" can that be supposed to be the meaning of a man who says, "I intend to leave 10,000*l.* in my will, besides this 10,000*l.*, which I have now given ; and that 10,000*l.* shall be settled upon her children, if she has any ; and if she has no children, then I reserve to myself the power of disposing of it as I please." According to the supposition, there was no occasion to reserve such a power, for it was all to be revised ; it was all to be subject to revision, and all subject to his own option, from the essentially ambulatory nature of the instrument. No, my Lords, this is not the meaning of the language : it is quite clear that it is a great deal more specific and more precise, and therefore more binding. For all which reasons I say that, in answer to the argument of the learned counsel, pressing us with what is no doubt the common practice of parents in these cases, if another case were to arise to-morrow, in which a parent, instead of holding out a general and vague hope, *opes successionis*, and nothing more, holds out a promise in distinct terms ; where the very sum is stated—which, by the way, is very seldom stated, it is very common to say, "You will be the better for my will, for I will leave you something ;" but I never recollect any person saying, "I will give you 10,000*l.*," any more than "I will give you 10,000*l.* 3 Per Cent. Consolidated Bank Annuities : " when the sum is specified, it does not sound

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to be only in hope but in promises, not only in intention, but in contract.—Then, if a case arises in which a person says, not generally in loose and vague language, but specifying the very sum, which is one circumstance here, and if he adds, I will settle in such a way on you and your children; but if you have no children, then I reserve to myself the power to dispose of it by my last will; my answer to the case put by the counsel is, “Bring me an instance of that kind, and I shall be of the same opinion, probably, that I am with respect to this case.”

Upon these grounds, therefore, I am clearly of opinion that the judgments of the Courts below are correct and well founded. I adopt all the arguments of the Judges below—with the single exception of a little mistake, committed, in point of fact, with respect to the practice of auctioneers (*l*), which, however, becomes quite immaterial to take the case out of the Statute of Frauds.—I am clearly of opinion with them, agreeing in all their arguments, and in addition to the arguments which they have urged, upon the reasons which have occurred to my own mind, which I have thus stated at length, as the importance of the case seemed to require, and as we have not heard the respondent's arguments. For these reasons, and upon these grounds, I entirely concur in the view of the case taken by my noble and learned friend on the woolsack, that your Lordships

they were so, it was not only right, but it was their duty to bring them before the Court of last resort. I am sure that there is nothing that appears in this case at all derogatory to the honour of that most respectable family (the *Thomsons*), who have brought this appeal (*u*).

At the same time I am bound to say, notwithstanding the very able arguments by the two counsel on the part of the appellants, that I do not entertain the slightest doubt whatsoever on the subject; and I think that it would be a waste of the public time if we called on the counsel for the respondent to answer their arguments.

With regard to the Statute of Frauds, the learned counsel has abandoned that ground of objection, and I think he was perfectly justified in abandoning it, because I think it cannot be supported. There can be no doubt that an authority may be delegated by a principal to an agent, or to agents, to execute an agreement in this form, which would be binding on the principal; and whether the signature is proper or not, must depend upon the authority that is given. The learned counsel could not at all deny the proposition that an authority might be given by a principal to an agent to execute an instrument in this form, which would be binding on the principal. If that be so, there is the most convincing evidence here under the hand of Mr. *J. P. Thomson*, that he did give that authority, because having a copy of the agreement before him, he writes in *April*, 1835, a letter, in which in plain words he intimates that his sons had authority to enter into this agreement on his behalf, and he thus brings it merely to a question of the legal construction of the instrument. He says that as different opinions had been given by lawyers

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(*u*) His Lordship added other observations on the integrity and ability of *J. P. Thomson* and his late deceased son *C. P. Thomson*, (Lord *Sydenham*), in which Lord *Brougham* express-

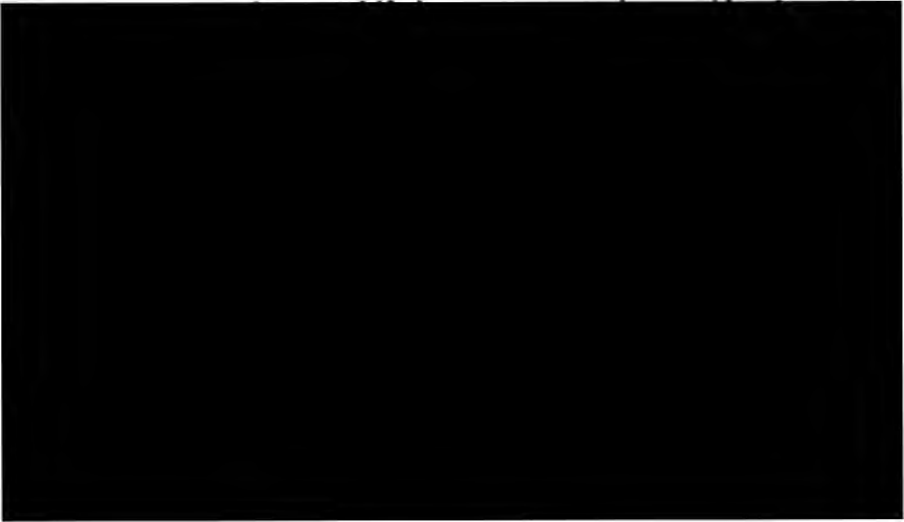
ed his entire concurrence, observing also, that the appellant being an executor and trustee, without any personal interest, was perfectly justified in bringing the appeal.

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he was then reluctant—and he was perfectly justified in being reluctant—at that time to advance this second sum of 10,000*l.*, which should be secured to the Baron *de Biel's* family. His daughter was dead, leaving a single child, and he reasonably thought that, looking to the expectations and interests of his descendants, he could more equitably, as he thought, dispose of that property, which it was still open to him to do, among other members of his family. That child of his daughter was sufficiently provided for by the 10,000*l.* that had been settled. But at the same time he brings it to a question merely as to the legal construction of the instrument.

Now this instrument being to be considered as made by the authority of Mr. *Thomson* himself, what reasonable doubt can be entertained that he was bound by it to leave by his will the second 10,000*l.*, just as much as to settle the first 10,000*l.*?

I think that the doctrine laid down by Lord *Cottenham* is fully supported by the authorities which have been cited: “A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will, in general, be sufficient to entitle him to the assistance of this Court for the purpose of realizing such representation (*v.*)” Of course, Lord *Cottenham* is here speaking of negotiations in reference to



this doctrine has been laid down, and I think has been most properly laid down, and ought to be acted upon.

But there is much more here than a mere representation made by one party for the purpose of influencing the conduct of the other party, because this is really a formal instrument, both with regard to the first 10,000*l.* and with regard to the second 10,000*l.* With regard to the 200*l.* a year, that was to be entirely discretionary, but with regard to the 10,000*l.*, I see no distinction that can be made between the first 10,000*l.*, which was to be settled in Mr. *Thomson's* lifetime, and the second 10,000*l.*, which he was to leave by his will. They were both to be given as a provision for his daughter and for her children.

I think that Mr. *Kelly* felt that so strongly that he was driven to rely on the words that occur here, "subject, of course, to revision." Of course he did not at all pretend to say that this second 10,000*l.* was to depend on a change of circumstances, but he relied on the words "subject, of course, to revision." When was this revision to take place? Mr. *Kelly* places great reliance on the letter of Mr. *Charles Poulett Thomson* (*supra*, p. 59). Upon that letter I put entirely the same construction as my noble and learned friend the Lord Chancellor has put. But Mr. *Kelly* need not be at all alarmed at the idea of the doctrine being laid down by this House, that, after a conditional contract has been entered into by a father with the suitor of his daughter, with the contingency attached of his afterwards having the opportunity of revising it, or changing the conditions, the daughter and the suitor may run away next morning to *Gretna Green*, and so deprive him of the opportunity that he had of modifying the contract. There is not the smallest pretence for saying that any such doctrine can result from our affirming the decree of the Court of Chancery in this case. Just observe, the conditions that were to be performed were the settlement to be made by the Baron *de Biel* on Miss *Thomson*. That is done. The 500*l.* a year was thereby settled upon her, so that she would

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clearly be entitled to that sum if she had survived her husband. No complaint is made of the marriage being premature, and no complaint could have been made, because no injury accrued either to Miss *Thomson* or to her relations. All has been done by the Baron *de Biel* which they expected that he should do, and that is to settle upon her this sum of 500*l.* a year.

Under these circumstances, it seems to me that the decree of the Master of the Rolls, affirmed by the Lord Chancellor, is perfectly according to the doctrine which has hitherto prevailed in Courts of Equity, and does not at all extend it; and I think that we should infringe on a very useful and necessary rule, if we were not to hold in this case that the contract is binding, and that this second sum of 10,000*l.* must now be settled on the issue of the marriage.

As to what took place when the settlement was executed, I own it seems to me to be rather immaterial, because we are considering the interests of the issue. This bill is filed by the child of the marriage, therefore the interest of that child could not at all be prejudiced by what took place when that settlement was executed. If there never had been any settlement on the faith of this agreement of *December*, 1825, that agreement alone would have been a sufficient foundation for this bill, which is filed on the part of the infant, that the second sum of

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WILLIAM LANDELL	-	-	Respondent.	March 10.

An attorney or law agent is only responsible in damages to his client for gross ignorance or gross negligence in the performance of his professional services.

*Attorney :
Law Agent :
Pleading.*

A declaration, or a summons against an attorney or a law agent, to recover damages for loss occasioned by his management of a cause, must charge gross ignorance or gross negligence, or must, at least, contain allegations of facts, from which the inference is inevitable that the defendant has been guilty of one or the other. The law as to both these matters is the same in England and in Scotland.

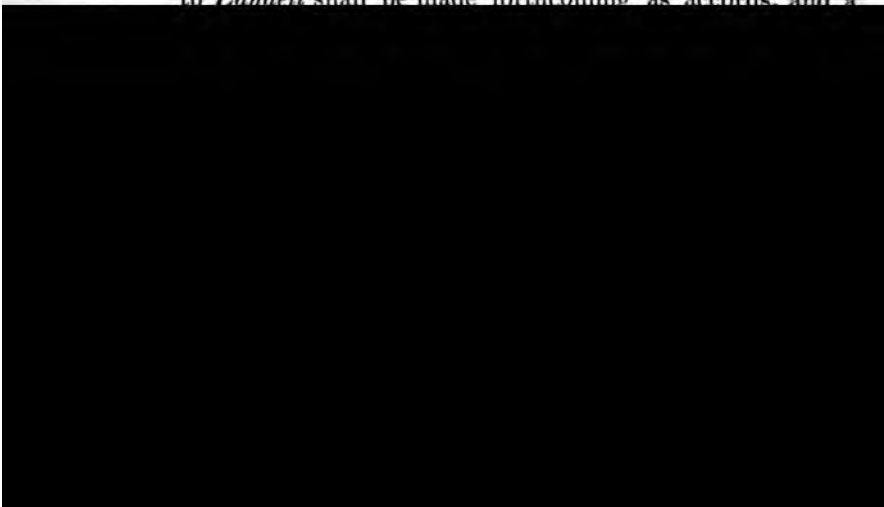


THIS was a suit instituted by *Landell* to recover from *Purves*, who was a writer to the Signet, compensation for the loss occasioned, as it was alleged, by his improperly conducting a previous suit (*a*), in which he had acted as law agent for *Landell*. The summons contained allegations to the following effect:—*Mark Landell*, of Coldingham Hill, the uncle of the respondent, was, at the time of his death, which happened many years ago, proprietor of an estate in Jamaica and of the negroes on that estate. He left a widow, *Margaret*, and a daughter, *Hannah Landell*, him surviving. By the law of Jamaica the widow was entitled to one-third of the estate in life-rent, the fee thereof being vested in the daughter, subject to the life-rent interest of her mother. *Hannah Landell* died on the 13th of March, 1833, and the respondent, who was her heir at law, then became entitled to the estate, subject to the life-rent of the widow. The compensation payable under the Slavery Abolition Act, in respect of the negroes on the estate of *Mark Landell*, amounted to 1,000*l.*, and

(*a*) *Landell v. Landell*, 16 Dunl., Bell., & Murr., 388.

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William Landell, as his heir at law, asserted himself to be entitled to receive two-thirds of that sum, or 720*l.*, as soon as the compensation was awarded, and to have the remaining third invested for his ultimate benefit, but subject to the life-interest of the widow. The whole of the compensation money had been claimed in Jamaica by the widow, who was at the time resident there, and had been paid over to her. In July, 1836, she came to reside at the village of Ayton, in the county of Berwick; and *William Landell* then employed *Purves* as his professional agent, that he might, as such, advise and adopt what legal measures were necessary for making her amenable to the Scotch Courts, in order that he might recover from her the money, which he contended she had improperly received. *Purves* recommended an application for a border warrant to compel her appearance, and represented that this mode of procedure was proper and legal; and he, being a regularly licensed agent or procurator before the sheriff Court of that county, *Landell* relied on the accuracy and correctness of his representations. *Landell* accordingly lodged the regular information with the sheriff clerk of Berwickshire; and *Purves* obtained a warrant in favour of *Landell*, to arrest the person and goods of *Mrs. Landell* "until she shall find sufficient caution acted in the Sheriff Court books of Berwickshire, that the debt due to *Landell* shall be made forthcoming as accords, and a



ciled in Scotland, nor having any property or effects in it, is not within the jurisdiction of the Court of Session, and the irregular and illegal proceedings which were adopted to force her, the said defender, within the jurisdiction of the Scotch Courts, are altogether ineffectual for that purpose." The Lord Ordinary adopted this preliminary defence, and reported the case, with his opinion, to the Court of Session; and the Lords there, concurring with him, pronounced the proceeding to be irregular and void, and dismissed the suit with expences. These expences amounted to above 121*l.*, which *Landell* paid to Mrs. *Landell*, and 69*l.*, which he paid to his own agent. Mrs. *Landell* afterwards brought an action of false imprisonment against both *Landell* and the sheriff clerk, and recovered damages, as against the former, to the amount of 500*l.*, and, as against the latter, to the amount of 300*l.* (*b*). The summons in the present suit therefore prayed that *Purves* might be declared liable to make good to *Landell* the sums of money which he had thus paid, or become liable to pay, in consequence of the irregularity of the warrant, together with the costs of this suit.

Purves, in addition to a defence on the merits, put in pleas in law, in which he contended that the summons did not set forth a legal cause of suit; that it only alleged that the proceedings had been held insufficient, but did not allege that he (*Purves*) had exhibited gross ignorance, or want of professional skill, or had departed from any established rule, or violated any acknowledged practice of the Court, or that he had been guilty of gross neglect in the conduct of the judicial proceedings against Mrs. *Landell*.

The case came before Lord *Cockburn*, as the Lord Ordinary, who being of opinion that the summons did not

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(*b*) *Landell v. Landell and Bell*, 3 Dunl., Bell, M., & D., p. 819, (1841).

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present a relevant case for the relief sought, dismissed it with expences. The cause was brought by a reclaiming note before the Lords of the second division of the Court of Session, who, by a decree of 27th May, 1842, altered this interlocutor, found the summons relevant, and remitted the cause to the Lord Ordinary to proceed therein (c).

This was the decree appealed against.

The Lord Advocate and *Mr. Turner* for the appellant.—A solicitor is not responsible for the failure of a case entrusted to his management when he pursues the ordinary and accustomed course in the conduct of it, nor is he liable except for gross ignorance or negligence, *Baikie v. Chandless* (d). To make him liable there must be either a manifest want of skill, or great negligence. Neither of these is charged here. The summons here does not, upon the facts stated, raise the question of negligence, or of want of skill; yet it ought to do so, and it ought to set forth all the facts that are material to constitute the ground of action. This want of a sufficient allegation of a cause of action must have been felt in the Court below; for Lord *Moncrieff*, in his judgment, said, that if all the facts stated were found as stated, he doubted whether they would shew a right to damages as against the agent (e). There is no allegation in this summons of gross negligence, nor of a



stated, it is clear that a direct allegation of gross negligence is necessary. *Stuart v. Miller* (*f*), *Morrison v. Ure* (*g*), *Campbell v. Clason* (*h*), and *Donald v. Yeats* (*i*), were all cases in which such an allegation was made, or the facts stated, raised, beyond all doubt, the charge of gross ignorance or negligence.

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Mr. Kelly and Mr. Anderson for the respondent.—This case depends on the form of Scotch pleading; and the question is not whether this summons discloses what in England we should call a cause of action, but whether the summons is sufficient according to the law of Scotland. The cases of *Stevenson v. Rowand* (*j*), and of *Lang v. Struthers* (*k*), shew that the rules of pleading are not the same in the two countries, and that the same strictness which we require here is not necessary there. [*The Lord Chancellor*.—Independently of the question of pleading, I am not able to understand how the law of Scotland and of England can, upon this subject, be different from each other, when you advert to the principle stated by Lord Mansfield, in *Pitt v. Yalden* (*l*), namely, that “an attorney ought not to be liable in cases of reasonable doubt,” as that on which his liability is to rest. Do you mean to say, that for every mistake committed by an attorney in the conduct of a cause, his client may claim damages?] The argument is not meant to be carried quite to that extent, but still it is clear that an attorney may be responsible even for the damage occasioned by the loss of the subject matter of the suit, or of any other proceeding where such loss has been the result of his ignorance or

(*f*) 3 Dunl., Bell, M. & D., 255.

(*j*) 2 Dow & Clark, 104.

(*g*) 4 Shaw & Dunl., 656.

(*k*) 2 Wils. & Shaw, 563,

(*h*) 1 Dunl., Bell, & Murr., Fac. Coll., 2 Feb., 1826.

p. 270; 2 *Id.*, p. 1113.

(*l*) 4 Burr., 2060.

(*i*) 1 Dunl., Bell, & M., p.

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negligence; *Bulkely v. Wilford (m)*, *Donaldson v. Haldane (n)*. But at all events it is clear that there is a distinction between the right of a client to claim damages in respect of money which he might have obtained but for the error on the part of the attorney, and his right to recover back the costs which, as a consequence of that error, he has been compelled to pay to the opposite party. The money out of pocket he must be entitled to recover. [Lord *Brougham*.—That is to say, that the attorney may not be held to have guaranteed the success of the suit, but must be held to have guaranteed the costs out of pocket. *The Lord Chancellor*.—The injury being the same, though assuming different shapes and forms]. That does seem to be so, but the identity is in appearance only. The two things are perfectly distinct from each other. In *Grahame v. Alison (o)*, it was held that an agent who had mistaken his course of proceeding, but had followed the usual practice in the case which was entrusted to him, could not be held responsible for the damage occasioned by the loss of the subject matter of the suit, but was responsible for the expences which had been incurred. That shews that the decision here is not to be governed by the rules of English law, and establishes the distinction already contended for, because there, Mr. *Alison*, the attorney, though not held bound to make good the loss of the

Rowanil (g), warrants him in doing so, and so does *Hart v. Frame* (r), for in those cases there was no direct allegation of gross negligence or want of ordinary professional skill. In *Wood v. Fullarton* (s), a writer, employed to raise horning and caption, was held liable to his client, against whom the debtor had brought an action, because the messenger denounced the debtor before the lapse of six days. It is clear, therefore, that where there has been something done, even by the authorised agent of the writer, which induces a damage to the client, the latter may recover such damages against the writer. The law agent will not be protected even where he has pursued the usual course, should that course turn out to be erroneous, and to occasion damage to his client; *Hart v. Frame* (r). The statement of the facts which constitute the misconduct of the agent, and shew his negligence or want of skill, is sufficient, without a formal allegation that he has been guilty of misconduct. Such an allegation would be useless without the statement of the facts; and the mere absence of that allegation cannot defeat the party's right to recover, when the facts themselves are clearly set forth. They are clearly set forth here, and the judgment of the Court below must be sustained.

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Lord Brougham.—My Lords, in this case I move your Lordships to proceed to reverse the interlocutor of the Court below, without hearing the learned counsel for the appellant in reply. I never saw a case which stood, in my opinion, upon clearer grounds. The learned Judges of the Court below were very much divided in opinion upon this case. It is a great mistake to represent it as one in which there was no very great difference of opinion; Lord *Cockburn* clearly expressing an opinion against this action, and the Lord

(g) 2 Dow & Clark, 104. (s) 1710, Nov. 28, Morr.,
(r) *Ante*, Vol. VI., p. 193. 13960.

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Ordinary (Lord *Jeffrey*) leaning the same way. Lord *Moncrieff*, too, went a great deal further than merely expressing a doubt or an inclination of opinion, because Lord *Moncrieff's* opinion upon the very point, the main point and pivot upon which this case turns, was that the Court was wrong, and he differed with the Court, and thought that there ought to have been on the record an allegation of negligence.

My Lords, I apprehend it to be by no means a technical question, depending upon the rules of pleading ; it is of the very essence of this kind of action that it depends, not upon the party having been advised by a solicitor or attorney in a way in which the result of the proceeding may induce the party to think he was not advised properly, and may, in fact, prove the advice to have been erroneous ; —not upon his having received, if I may so express it in common parlance, bad law, from the solicitor ; nor upon the solicitor or attorney having taken upon himself to advise him, and, having given erroneous advice, advice which the result proved to be wrong, and in consequence of which error, the parties suing under that mistake were deprived and disappointed of receiving a benefit. But it is of the very essence of this action that there should be a negligence of a crass description, which we call *crassa negligentia*, that there should be gross ignorance, that the

friend on the woolsack has referred a little while ago, and which is also referred to in the printed papers. It was still more expressly laid down by Lord *Ellenborough* in the case of *Baikie v. Chandless*(u), because there Lord *Ellenborough* uses the expression, "an attorney is only liable for *crassa negligentia*;" therefore, the record must bring before the Court a case of that kind, either by stating such facts as no man who reads it will not at once perceive, although without its being alleged in terms, to be *crassa negligentia*—something so clear that no man can doubt of it; or, if that should not be the case, then he must use the very averment that it was *crassa negligentia*.

I will not go so far as to say that, if it were for some very gross case, such, for instance, as a man advising his client that his oldest legitimate son was not his heir-at-law,—or any other thing which, upon the face of it shews gross ignorance of the A. B. C. of his profession, and the most crass negligence in the performance of his professional duty—in such a case, it is not necessary to go so far as to say, that that would not be equivalent to that which is wanting here, namely, an averment, in terms, of impropriety, of breach of professional duty, or want of sufficient knowledge, or gross and crass negligence. It is not necessary to proceed upon that supposition, nor to decide whether in England or in Scotland a declaration or a summons, in a form like the present, would or would not, in such a case, be sufficient; for aught I know, it might; but that is not the case here. It is merely set forth, that a border warrant was issued; and it is further stated, that a personal damnification took place. That is all. There is no statement of the facts, which at once explains itself, so that he who runs may read. Nor is there a statement in terms that there was gross negligence. The case is wholly a blank upon these two matters, one

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(u) 3 Camp. 17.

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or other of which ought to appear on the record, otherwise the action does not lie.

Now that being the case, I cannot go into the alarming doctrine laid down by the Lord Justice Clerk (*v*), as to a supposed distinction between error in cases where the liberty of the subject is concerned, and cases of a different kind, which I hold to be quite erroneous, and which I think is not accurately reported. It is said it is unnecessary to allege that Mr. *Purves* was guilty either of want of skill or of negligence; it is enough to allege that what he had done was a nullity.

Now the mere allegation and proof of such a fact as that could never be sufficient; because, unless a great deal more is proved, you may just as well say that in every nonsuit, or every action that failed, or every case in which what is called an infructuous proceeding has taken place, even though the attorney should really be successful in the case, yet that, should there not be a beneficial result from the action, that circumstance alone would make the attorney liable. No man can possibly conceive that such is the liability of an attorney. There must be considerable mismanagement, considerable ignorance, and the absence of attentive conduct in general: unless it is gross, the law holds that it is sufficient.

It is said there are such cases here; the case in *Morri-*



England and Scotland in those respects. That is not the case; but if it was so, the argument would only go to shew, that, because there is a difference in one respect, that therefore there must be a difference in the other, which is a very unsatisfactory mode of reasoning.

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It is contended that Mr. *Purves* had notice of Lord *Jeffrey's* interlocutor, which was against him, and that therefore he was bound to indemnify his client from the consequences of his having advised him, in the teeth and in the face of that interlocutor, to reclaim to the Inner House. It would be his bounden duty to advise him not to rest satisfied with the first unfavourable opinion, and to see whether it was well founded. If it were not so, you might just as well say, that in every case in the Courts below where the decision is against a man, and from which he appeals here, that if it is affirmed upon appeal there is crass negligence, or at least a case entitling the party who has lost the appeal to an indemnity; because the man who was served with the notice in the course of the business was aware that there had been a decision against his client below, and therefore he ought to have known that his client could not succeed upon appeal. Such a doctrine never could be maintained.

I am of opinion, upon all these grounds, that there is no reason to support the interlocutor of the Court below, and that it must be reversed.

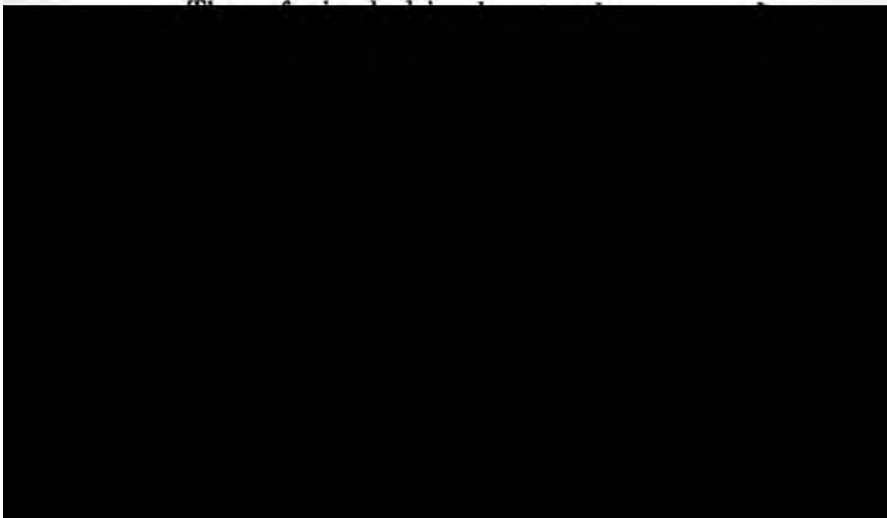
Lord *Campbell*.—My Lords, I am extremely sorry for the situation in which Mr. *Landell* is placed; but we must not be carried away by feelings of compassion, we must be bound by the principles of law, and upon those principles I have no doubt at all, that Lord *Cockburn* and the Lord Ordinary took a just view of this case, and that we are bound to sustain their decision.

Now what is the action we are to determine upon? It is an action in which *William Landell* complains that he

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having brought an action against *Margaret Landell*, and having retained Mr. *Purves* as his professional adviser, that in the proceeding of that action against *Margaret Landell*, Mr. *Purves*, his professional adviser, was guilty of misconduct, whereby an action was brought against him by Mrs. *Margaret Landell*, and damages and costs were recovered, which he was obliged to pay. What is necessary to maintain such an action? Most undoubtedly that the professional adviser should be guilty of some misconduct, some fraudulent proceeding, or should be chargeable with gross negligence, or with gross ignorance. It is only upon one or other of those grounds that the client can maintain an action against the professional adviser. And thus far it is quite unnecessary here to look at the case that has been referred to, which came on in the time of Lord *Mansfield*, because there the action was to recover back money which had been paid by the client to the professional adviser. It was a totally different proceeding from that which we have now to determine upon.

In an action such as this, by the client against the professional adviser, to recover damages arising from the misconduct of the professional adviser, I apprehend there is no distinction whatever between the law of Scotland and the law of England. The law must be the same in all countries where law has been considered as a science.



determined. Well then, this may happen in all grades of the profession of the law. Against the barrister in England, and the advocate in Scotland, luckily, no action can be maintained. But against the attorney, the professional adviser, or the procurator, an action may be maintained. But it is only if he has been guilty of gross negligence, because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake. You can only expect from him that he will be honest and diligent; and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable. It would be utterly impossible that you could ever have a class of men who would give a guarantee, binding themselves, in giving legal advice and conducting suits at law, to be always in the right.

Then, my Lords, as *crassa negligentia* is certainly the gist of an action of this sort, the question is, whether in this summons that negligence must not either be averred or shewn? This is not any technical point in which the law of Scotland differs from the law of England. I should be very sorry to see applied, and I hope this House would be very cautious in applying, technical rules which prevail in England to proceedings in Scotland. But I apprehend that, in this respect, the laws of the two countries do not differ, and that the summons ought to state, and must state, what is necessary to maintain the action; this summons must either allege negligence, or must shew facts which inevitably prove that this person has been guilty of gross negligence. Now, here it is not at all pretended that there is any allegation of negligence.

Then what is the fact shewn from which negligence is necessarily to be inferred? Why, there is a warrant, which was sued out by Mr. *Purves* or by his advice, against *Margaret Landell*, while she was living in Berwick, upon the borders of the kingdom of Scotland, she not being domiciled in Scotland, but being domiciled in England.

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It was held, that, upon that ground, that warrant was void. It might have been subject to other objections, for anything I know to the contrary; but it was held void upon that ground, that she neither had property in Scotland nor effects in it, one of which circumstances was necessary *ad fundandam jurisdictionem*; nor was she domiciled in Scotland, and so was not liable to be sued in the Courts of Scotland. It was upon these grounds that the warrant was held to be insufficient, and that the action of *Landell* against *Margaret Landell* failed. Was that sufficient to make a case for an action against the attorney, when the question must be, was he guilty of negligence? It might have been proved that she had large property in Scotland. He might have been told that she had been domiciled in Scotland. He might have been told that she had been living so long away from England; that she had abandoned all thoughts of returning there, and had removed her Household Gods to Scotland, and represented that as her domicile. It is possible he might have been told that that was the fact, although it turned out that she was not domiciled in Scotland, and had no property in Scotland.

How then can we inevitably infer from the simple fact of the warrant being found bad, that *Purves* was guilty of gross negligence? He may have been; I know nothing

to maintain the action, nor does it shew facts that raise a necessary inference that any gross negligence did exist.

We were referred to a case to shew, that, by the law of Scotland, it is not at all necessary to allege in the summons that there has been negligence. But that was where there had been a clear breach of duty. The strongest case is that of *Stevenson v. Rowand* (y). Now, when we examine that case, as set out by the appellant in his printed papers, it appears that the ground of action was upon that summons abundantly set out; because the action was brought for the breach of a specific duty, which duty was set out upon the face of the summons. There is, upon the face of the summons, an allegation, "that *Stevenson* did not complete the said security in a legal manner, by obtaining from the superior any confirmation of the said bond and disposition in security, or of the aforesaid instrument of sasine following thereon. That it was incumbent upon the said *Nathaniel Stevenson* to procure a legal and valid security for the said *Henry Wardrop* and the pursuer, so as to render it complete and effectual against all subsequent deeds and infestments; and as the pursuer has sustained much loss, damage, and expence, in consequence of the said *Nathaniel Stevenson* not having drawn and completed the said heritable security in such form and manner as would have given the same priority, but in such form and manner as has postponed the same to a posterior security and burden, over the said lands and others, he is bound in law, justice, and equity, to free and relieve the pursuer from the loss, damage, and expence thereby occasioned."

Now what does that mean? It is a plain allegation that it was the duty of *Stevenson* to procure the security there stated to be framed in a particular manner, and that he had not procured it to be framed in that particular manner, whereby a loss had accrued to the party who com-

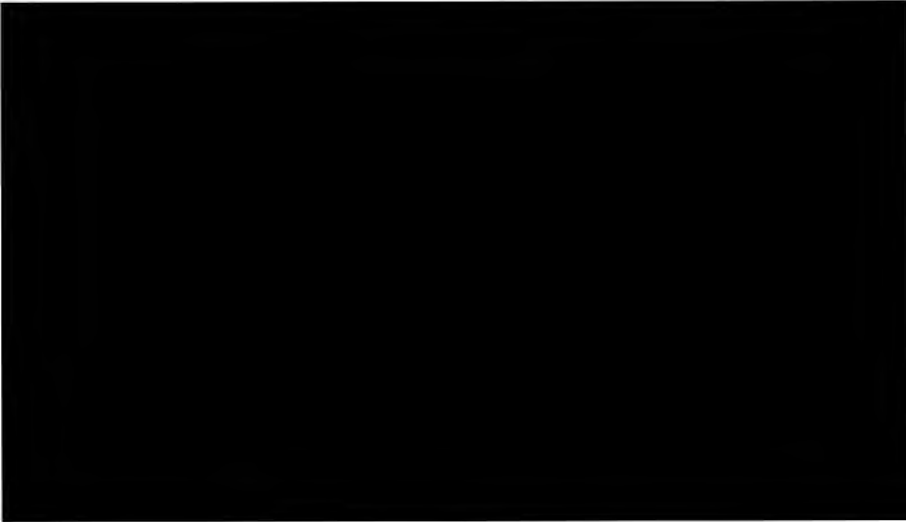
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(y) 2 Dow & Clark, 104.

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plained. Upon this it would have been the easiest thing in the world to frame an issue, whether it was incumbent upon *Stevenson* to do what was alleged, and whether he had failed in the discharge of his duty. But upon the summons here it would be impossible to frame any such issue; the only issue that could be framed has been framed by the clerk who discharges that duty. He has looked at the summons, and he has framed the best issue that the summons would admit of, and yet upon the face of it we find that the issue avers a finding in favour of the pursuer, which could not have been found by the special finding of the jury, for, although the warrant might have been wrong, he still might have acted with the greatest care.

There is no attempt whatever to shew that in such an action by the practice of the law of Scotland, it is not necessary for a man to allege negligence, or to shew facts from which negligence must inevitably be inferred. As to the distinction supposed to have been taken by the Lord Justice Clerk (z) between "a warrant that affects the liberty of the subject, and any ordinary matter of business in which an agent may be employed;" it appears to me, as well as to my noble and learned friend, that that learned and most laborious Judge must have been inaccurately reported with respect to that distinction: because, if the report is accurate, it seems that upon all other actions



cept that it seems to me that there must have been some mistake in the report, because, although some proceeding may have taken place, whereby the liberty of the subject may be affected in the course of a judicial proceeding, yet no one could be liable but the professional adviser; and he cannot, unless he has been guilty of some negligence, as he does not guarantee the correctness of the advice which he gives.

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On these grounds, my Lords, I think the reasoning of the Lord Ordinary, in his note, is perfectly satisfactory, and I regret that it came before the Second Division of the Inner House, and that when there Lord *Moncrieff's* doubt or opinion did not prevail. I regret that there has been this distinction attempted to be made, because the distinction does not rest upon principle or authority; and, therefore, I apprehend that this interlocutor of the Second Division must be reversed, and that the interlocutor of the Lord Ordinary should be affirmed. And I presume that now the judgment of this House should be that Mr. *Purves* be assailed from the conclusion of the summons, and the interlocutor be recalled.

The Lord Chancellor.—My Lords, I am of the same opinion that has been expressed so fully and ably by my noble and learned friends in this case. It is quite unnecessary for me, after the detailed manner in which they have adverted to the particular facts of the case, to go over the same ground. I shall, therefore, state, in a very few words, the principle upon which I think this question ought to be decided, and, in fact, it is nothing more than a repetition of what has been stated by my two noble and learned friends.

It is quite clear that the summons must state a sufficient cause of action. When an action is brought against a solicitor, he is liable merely in cases where he has shewn a want of reasonable skill, or where he has been guilty of

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gross negligence. The summons therefore, I apprehend, must state either a case of gross negligence, or a case of breach of duty. Now it is quite clear in this case, that upon the summons, there is no positive statement of any want of reasonable skill, nor any express statement of negligence; and I am of opinion that, upon the other facts stated in the summons, there is nothing equivalent to this averment. It follows therefore that the summons in this respect is defective, and I think that the interlocutor of the Court below ought to be reversed.

(Ordered and adjudged, That the interlocutor of the 27th May, 1842, complained of in the said appeal, be reversed; and it is further ordered, that the case be remitted back to the Court of Session in Scotland, with directions to that Court to adhere to the interlocutor of the Lord Ordinary, of the 19th of March, 1842, and to proceed further therein as shall be just and consistent with this judgment.)

JOHN HAMILTON	-	-	-	<i>Appellant.</i>	1845.
JAMES WATSON	-	-	-	<i>Respondent.</i>	March 11.

A surety is not of necessity entitled to receive, without enquiry, from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and that party.

*Bond.
Concealment.
Surety.
Pleading.*

If he requires to know any particular matter, of which the party about to receive the security is informed, he must make it the subject of a distinct enquiry.

An obligation to a banker by a third party to be responsible for a cash credit to be given to one of the banker's customers, is not avoided by the fact, that, immediately after the execution of the obligation, the cash credit is employed to pay off an old debt due to the banker.

If the surety intends to rely upon such a fact for his defence, as shewing that there was a previous agreement between the banker and the customer to deal with the credit in a particular manner, to which he, if he had known it, should not have consented, he must bring such a defence before the Court by putting it on the record.

THIS case originated in a suspension of a charge upon a cash credit bond for 750*l.*, granted to the Glasgow and Ship Bank by the appellant, as cautioner or surety for the late *Peter Elles*, merchant in Glasgow. The following are the circumstances of the case:—

In March, 1835, the late *Peter Elles* obtained a cash account for 750*l.* from the firm of *Carrick, Brown, & Co.*, carrying on the business of bankers in Glasgow, under the name of the Ship Bank. A bond was then granted by *Elles* and by his father, with two other cautioners or sureties, *Alexander Dewar*, now deceased, and *David Anderson*, manufacturer in Glasgow.

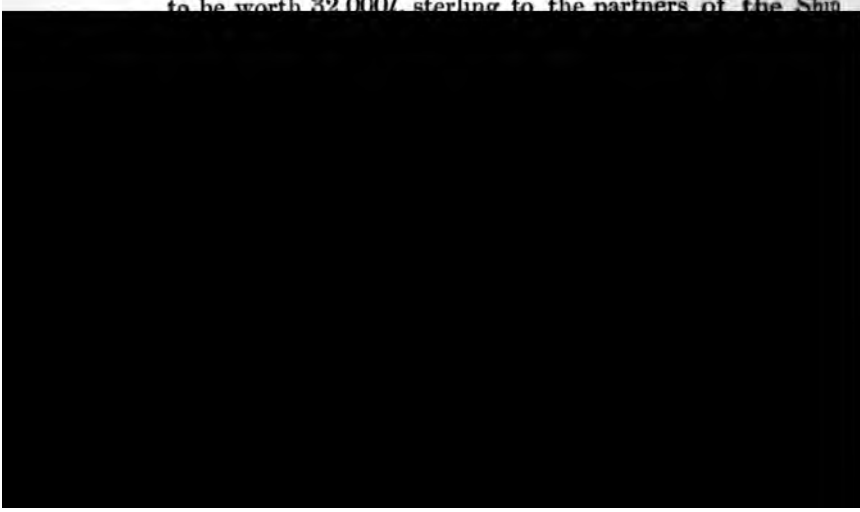
The whole of the sum thus credited was drawn out by

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Elles before the end of the month, and the only other entries in the account were those of the addition of interest at the close of the years 1835 and 1836.

Carrick & Co., on the 29th December, 1835, wrote to *Elles* announcing the death of Mr. *Alexander Dewar*, one of the obligants, and requesting that the credit might either be paid up, or renewed with additional security. This demand for a settlement was repeatedly renewed, but without effect.

In July, 1836, a junction was formed between the bank conducted by *Carrick* and Co., and the Glasgow Bank Company. By a contract then entered into between these parties, it was agreed, that the banking business and firm of the Ship Bank should, from and after the 1st July, 1836, merge in the business of the Glasgow Bank, and be thenceforth carried on under the style and firm of "the Glasgow and Ship Bank Company," or such other style and firm as they might afterwards choose to adopt. It was farther stipulated, that the proprietors of the Ship Bank should transfer and convey to the new company their whole establishment, and their whole property, securities, bills, and other obligations, with certain exceptions specified in the contract, at a certain valuation put thereon; and on the other hand, the Glasgow Company became bound to transfer and make over 200 shares of original stock, estimated to be worth 32,000*l.* sterling to the partners of the Ship



representative of the Glasgow and Ship Bank, wrote to require payment of the debt due from *Elles*, and on the 22d of that month, the latter sent an answer, proposing a new bond with a substitute surety instead of *Dewar*. The offer was declined. In March, 1837, these negotiations were renewed, but it was not until October, 1837, that any arrangement was finally made. In that month a new bond was executed with the appellant, as a surety, and it was arranged that the new cash-account should be opened in name of the firm of *Elles, Hutcheson and Company*, of which *Peter Elles* was then the sole partner.

This new bond contained the following statement, "that the company carrying on business in Glasgow as bankers under the firm of 'the Glasgow and Ship Bank Company,' have agreed to allow us credit on a cash-account to be kept in the books of the said bank company, at their office in Glasgow, in name of the said firm of *Elles, Hutcheson and Company*, to the amount of 750*l*." The parties, therefore, bound themselves, jointly and severally, to pay to the bank "the foresaid sum of 750*l*., or such part or parts thereof as shall appear to be due to the said Glasgow and Ship Bank Company on the said cash-account to be kept in their books in name of the said firm of *Elles, Hutcheson and Company*, as aforesaid, upon their drafts or orders on, or receipts to the said Glasgow and Ship Bank Company."

It did not appear that when the appellant signed this bond he was aware of any of the previous transactions between the bank and *Elles*, nor was any information on that subject given to him by the respondent.

On the 13th October, 1837, being within a week after the date of the bond, the interest upon the old cash account due by *Elles* was calculated and added to the principal, making the whole sum due 838*l*. 7*s*. 1*d*. On the same day, *Elles* drew a draft upon the new account with the Glasgow and Ship Bank for 750*l*., being the total

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amount of the credit for which the appellant had become bound. No part of the sum contained in this draft was actually paid to *Elles*. The draft was simply handed to the teller of the bank, who made entries in his book, debiting the new Company with the whole amount of the debt due on the old account, and crediting them with the amount of the draft. With this order, and a sum of 88*l.* 7*s.* 1*d.*, paid by Mr. *Elles* in cash, the account between him and *Carrick* and Co. was credited by an entry to this effect,—“1837, Oct. 13. By cash in full, 838*l.* 7*s.* 1*d.*”

Elles subsequently deposited several sums in his account, which were generally of small amount, and drawn out again at short intervals.

Some time afterwards Mr. *Elles* died in insolvent circumstances, and his estate was sequestrated. The appellant was then required by the Glasgow and Ship Bank to pay the money due on his bond, with the interest thereon, amounting in the whole to 818*l.* 7*s.* 3*d.*, and proceedings were taken by the respondent to enforce this demand.

The appellant having discovered the facts above stated, presented a suspension of this charge, first, on the ground that his suretyship was void, as all the circumstances of the dealings between the parties had not been communicated to him; and secondly, that the suretyship related only to prospective advances, and could not be made



cess. A majority of their Lordships accordingly decided that the bond of caution was binding on the appellant, notwithstanding the circumstances under which it was obtained; the Lord Justice Clerk dissenting from this judgment, and delivering his opinion, to the effect that there had been a secret agreement or understanding entered into between *Elles* and the bank, which had not been communicated to the appellant, and that a fraud had thus been practised upon him, whereby his cautionary obligation had been rendered null and void (a).

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Mr. *Turner* and Mr. *Anderson* for the appellant.—There has been a concealment here, which relieves the surety from his responsibility. When a bank takes a security from a person becoming surety for one of its customers, the managers of the bank are bound to communicate to the proposed surety every information which, in relation to the suretyship, it may be material for him to know. If such information is not communicated, the surety is released. This principle has often been recognized in the English authorities; *Glyn v. Hertel* (b) established it in the plainest manner. There a guarantie, given for the sum of 5000*l.*, was held not to cover money to that amount already due, but to extend only to future loans. That case exactly applies to, and must govern the present.

What are the facts here? There was an old debt of 750*l.* existing in March, 1835; and the money thus due, continued unpaid from that time till the 13th of October, 1837. During that time applications were made by *Car- rick & Co.* for payment, and further transactions were declined unless payment was made. [*The Lord Chan- cellor.*—There were two or three sureties; one of them

(a) 5 Bell, Murray, Donald-
son, and Young, 280.

(b) 8 Taunt. 208; 2 Moore,
134.

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died ; and in consequence of that circumstance application was made for payment, or that another surety should be provided.] No surety was at that time substituted in the place of the person who had died ; but at length, in August, 1837, the managers of the bank consented to draw out this bond of suretyship, which they sent to *Elles* to get executed by the appellant, who had been proposed as the new surety. It was executed by the appellant, and then handed by *Elles* to the bank. The circumstances of the person for whom the security was given—that is to say, the circumstances of his dealings with the bank—were not communicated by the managers of the bank to the proposed surety. It was not communicated to him that the security into which he was about to enter for *Elles* was not for a fresh cash credit to that person, but was in fact a mere undertaking to pay an old debt of his. There was therefore, as to the appellant, a material suppression of facts with which he was entitled to be acquainted ; those facts were in the knowledge of the parties to whom he was to become bound ; they were such as were likely materially to influence his mind in undertaking or declining the suretyship, and ought to have been communicated to him before he entered into it. The Scotch cases of *Smith v. The Bank of Scotland* (c), and that of *The Leith Banking Co. v. Bell* (d), clearly shew, that in circumstances of suretyship bankers are bound to communicate to a surety

lays down that rule. There an agreement was made between the vendors and the vendee of goods, that the latter should pay 10s. per ton beyond the market price, which sum was to be applied in liquidation of an old debt due to one of the vendors. The payment for the goods was guaranteed by a third person; but this secret bargain between the parties not having been communicated to him, the guarantie was, on that account, held to be void. The same principle was applied in *Stone v. Compton* (f), and a note given by A. to C., as security for a loan of 2500*l.* to be made by C. to B., was held void, because, before the making of the note, it had been agreed between B. and C. that part of the sum lent should be applied in payment of an old debt due from B. to C., and such agreement was not communicated to A. The principle of the law with regard to a surety is therefore clear: it is, that all the circumstances which affect his liability must be communicated to him. [*The Lord Chancellor*.—It does not seem to me that there is here any allegation of fraud or misrepresentation, or even of any secret agreement as to the way in which the money was to be applied.] All the circumstances are stated; and they shew the probable existence of an agreement, and the concealment of it from the surety. The law will not allow such a concealment. This House has, in the recent case of *Railton v. Mathews* (g), acted on that rule, and reversed a decision of the Court of Session; by which it was declared, that concealment, such as would avoid a security, must be concealment with a view to the advantage of the party who was guilty of it. This House condemned such a restrictive rule, and declared, on the contrary, that mere non-communication, though not wilful, of circumstances affecting the situation of the parties material

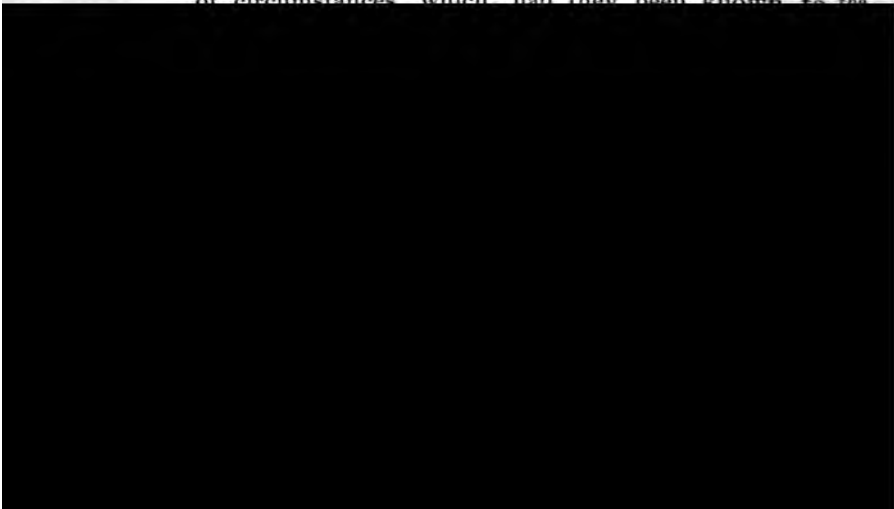
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(f) 5 Bing. N. C., 142; 6 Scott, 846. (g) 'Ante, Vol. X. p. 934; 3 Bell, 56.

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for the surety to be acquainted with, and within the knowledge of the person obtaining a surety bond, amounted to undue concealment, and with that declaration of the law remitted the case to the Court of Session. The law in both countries is therefore the same, and requires that the surety should be informed of all the circumstances which will affect his interests at the moment of undertaking the liability.

The *Lord Advocate* and the *Solicitor General* (Sir F. Thesiger) for the respondent.—The principle of law is not disputed here; but its applicability in the present case is denied. In all the cases cited, there was a concealment of something which affected the very nature of the contract entered into by the surety. Thus in *Pidcock v. Bishop* (*h*), the surety intended only to undertake for the payment of the value of certain goods then sold; but by the secret bargain between the parties, he was made to undertake for the payment of the goods, and also of a previously existing debt. A fraud was therefore practised on the surety, who was made to undertake one liability when he only intended to undertake another. There is nothing of the same kind here. Again, as to the cases of *Smith v. The Bank of Scotland* (*i*) and the *Leith Banking Company v. Bell* (*k*), the concealment was in respect of circumstances which, had they been known to the



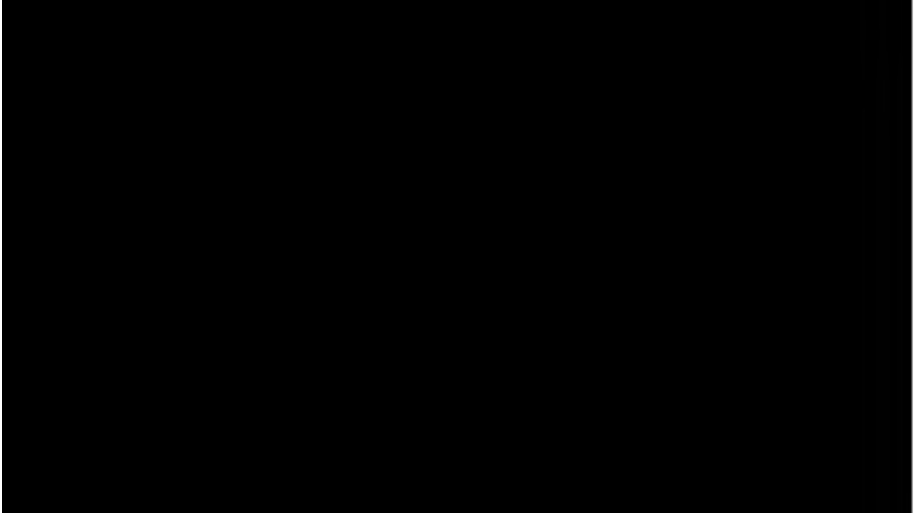
the deed of suretyship contained a false representation, to the effect that an antecedent debt had been paid, whereas in fact the payment was, by a private arrangement, kept secret from the surety, to be effected by the means of the settlement obtained through his suretyship. That false representation was a fraud, which of course vitiated the whole transaction. No such fraud has been committed here. Admitting, therefore, to the fullest extent, the authority of these cases, it is submitted that they do not apply to the present. The only fact that the bankers here could communicate was, that *Elles* was not able at the moment to pay his own debts, and could not get money except through the credit of a third person. But that fact was evident from the circumstance of his requiring a surety; for had he been in flourishing circumstances, there would have been no need of a surety to obtain him a credit. The argument on the other side cannot be maintained without the appellant going the length of contending that the surety is entitled to know the specific use to which the money raised on his credit is to be applied. Information to that extent would, in most cases, be impossible; and if any necessity to impart it could be imposed upon bankers, they must altogether refuse cash credits to any of their customers. The appellant has not sustained any injury from this transaction. He became a surety for *Elles* in order to give *Elles* the benefit of the disposal of a sum of 750*l*. That benefit *Elles* has enjoyed. It could make no difference to him to which of the creditors of *Elles* the money was paid, or whether it was paid to satisfy a debt then in existence, or to purchase goods, from the sale of which *Elles* might raise money to pay a previously existing debt. The application of the fund cannot in this case affect the question. The two objections raised to the surety's liability form in fact but one; and neither constitute, in fact nor in law, any good reason for depriving the respondent of the right to enforce this bond.

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The Lord Chancellor.—My Lords, I have already stated during the argument, that I considered that there was no averment of any agreement as to the mode in which the money was intended to be applied; and I have stated the substance of the opinion which I entertain upon this point. The mere circumstance of the parties supposing that the money was intended to be applied to a particular purpose, and the fact that it was intended to be so applied, do not appear to me to vitiate the transaction at all. If there was a stipulation that it was to be so applied, and these were the conditions upon which the money was advanced, it might have affected the transaction. But, in order to raise that question, there should have been an averment upon the record that such an agreement had been entered into. In the absence of any such averment, I think the parties are not in a condition to rest their case upon the mere implied existence of such an agreement, and, therefore, I think the judgment of the Court below ought to be sustained.

Lord Brougham.—My Lords, I am of the same opinion, and I have never entertained any doubt from the beginning. Fraud is neither averred, nor supposed to be averred, nor are the circumstances so stated as to raise the inevitable inference of fraud or deception, and the party, the real cr-



would entirely knock up those transactions in Scotland of giving security upon a cash account, because no bankers would rest satisfied that they had a security for the advance they made, if, as it is contended, it is essentially necessary that every thing should be disclosed by the creditor that is material for the surety to know. If such was the rule, it would be indispensably necessary for the bankers to whom the security is to be given, to state how the account has been kept : whether the debtor was in the habit of overdrawing ; whether he was punctual in his dealings ; whether he performed his promises in an honourable manner ;—for all these things are extremely material for the surety to know. But unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure ; and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect ; and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires. Now, in this case, assuming that there had been the contract contended for, and that that had been concealed, that would have vitiated the suretyship. There is no proof, nor is there any allegation that there was any such contract. There is, therefore, neither allegation nor proof, and what then does the case rest upon ? It rests merely upon this, that at most there was a concealment by the bankers of the former debt, and

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of their expectation, that if this new surety was given, it was probable that that debt would be paid off. It rests merely upon non-disclosure or concealment of a probable expectation. And if you were to say that such a concealment would vitiate the suretyship given on that account, your Lordships would utterly destroy that most beneficial mode of dealing with accounts in Scotland.

Lord Brougham.—I am not at all clear (though it is quite immaterial) that the surety would have acted differently if he had known of the matter thus said to be concealed. That has been taken for granted all the while.

Judgment affirmed, with costs.

JOHN COOKSON	-	-	-	<i>Appellant.</i>	1845.
ISAAC COOKSON AND OTHERS	-	-	-	<i>Respondents.</i>	Feb. 27, 28; March 15.

Where money is directed to be vested in land or other security, but the conversion has not, in fact, taken place until the whole interest—whether in land or money—has become vested absolutely in one person, any act of his, indicating an option in which character to take or dispose of it, will determine the succession as between his real and personal representatives.

*Money to be
vested in Land
or other
Securities.
Conversion.
Re-conversion.*

A testator gave his residuary estate to his wife, and appointed her his executrix, with the tuition of his younger children, and to provide for them with regard to their fortunes; and he advised her thus:—"As to my son *John*, I would have 250*l.* a-year paid him until a sum of 10,000*l.* can be invested in land, or some other securities, which is to be invested in trustees, for his use, as to the interest of such money or produce of such lands, for his natural life; and if he marries with consent, &c., that he may make such settlement on such wife, &c., as you may judge proper, and that the remainder may go to such child or children he may have lawfully begotten; but in failure of these, to my eldest son *Isaac* and his heirs for ever."

The sum of 10,000*l.* was vested partly in personal securities, and partly on mortgage of real estate; and on the death of *John* without having any child, his widow, being entitled to the interest for life, and *Isaac*, entitled to the principal on her death, by their acts indicated their intention to take the fund as money. *Isaac* survived the widow, and died intestate.

Held, that even if the fund had been impressed by the will with the character of real estate—which was doubtful—it was re-converted into personalty by the subsequent acts of the party absolutely entitled, and therefore it belonged to the next of kin of *Isaac*, and not to his heir.

—♦—

JOHN COOKSON, by his will, dated the 7th of March, 1774, after making a specific devise to his wife for her life, and making an appointment of a settled estate and

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some specific devises and bequests in favour of his eldest son, *Isaac*, gave all other his lands, goods, and chattels to his wife, and appointed her sole executrix, “with the tuition and education of all every such younger children, and to provide for them with regard to their fortunes as they might deserve and merit.”

The testator, at the time of making his will, also wrote a further testamentary paper, as follows:—“*Instructions or advice to my wife*, with regard to my younger children:—As to my son *John*, who intends for the law, I would have 250*l. per annum* paid him, until a sum of 10,000*l.* can be invested in land or some other securities, which is to be invested in trustees for his use, as to the interest of such money or produce of such lands, for his natural life; and if he marries with your consent and approbation, first obtained in writing, and not otherwise, that he make such settlement on such wife as he may marry as you may judge proper, and that the remainder shall go to such child or children he may have lawfully begotten; but in failure of these, to my eldest son *Isaac* and his heirs for ever. As to my son *Thomas*, I propose he should have the same sum, but with the same limitations as my son *John*. As to *Joseph*, I would have him brought up to business, and to give the amount in some business I am concerned, in the like manner, to prevent its being spent,

the mother was a party, after reciting the said will and testamentary paper, among other things, it was witnessed, that, in consideration of the intended marriage, and of the covenants of the said *H. J. Reed*, thereafter contained, the said *J. Cookson* covenanted that he would, within six calendar months after the solemnization of the then intended marriage, cause 10,000*l.* to be raised out of the assets of the said testator, and pay or cause the same to be paid to or vested in *Henry Ulrich Reay* and *Thomas Lowes* (parties to the indenture), their executors, administrators, and assigns, upon trust, that they, or the survivor, &c., should, with the approbation of the said *J. Cookson* and *H. J. Reed*, his intended wife, or the survivor of them, so soon as a convenient purchase or purchases should be found, lay out and dispose of the said sum of 10,000*l.*, in one or more purchase or purchases of freehold messuages, lands, tenements, or hereditaments of an estate of inheritance in fee simple in possession, in some part or parts of *England*, and thereupon settle, convey, and assure, or cause and procure to be settled, conveyed, and assured, all such messuages, lands, &c., so to be purchased, to the use of the said *J. Cookson* and his assigns, during his life, with remainder to trustees to preserve contingent remainders, with remainder to the use of his said intended wife, and her assigns, for her life, for her jointure, and in lieu of dower, with remainder to the use of such child or children as the said *J. Cookson* might have lawfully begotten, for such estate, and in such manner as the said testamentary paper, so signed by the said testator, in its true construction directs, with such limitation over as in the said testamentary paper is mentioned. And it was by the said indenture provided and declared, that it should be lawful for the said *Reay* and *Lowes*, and the survivor of them, &c., with the approbation of the said *J. Cookson* and *H. J. Reed*, his intended wife, until such purchase or purchases should be made, or in case by the true construction of the said will and testamentary paper

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the said sum of 10,000*l.* ought not to be laid out or invested in the purchase of lands, to lay out and invest the said sum upon any public or private securities, or in the purchase of any public stocks, and from time to time to call in and receive the money so lent or placed out on securities, or to sell and dispose of such stocks so to be purchased, and again to lend or invest the same monies, or any part thereof in manner aforesaid, as often as they should think fit, with such approbation as aforesaid. And that all the clear yearly interests, dividends, and annual proceeds of the said monies, and of the stocks or securities upon which the same should happen to be invested, should from time to time be paid to such person or persons as and to whom the rents and profits of the messuages, &c., so to be purchased as aforesaid, if purchased and settled, would for the time being belong, by virtue of the same indenture and of the said testamentary paper, so made by the said testator.

John Cookson received the legacy of 10,000*l.* from his father's executrix, and it was invested in the names of *Reay* and *Lowes*, as to 5000*l.* thereof, in the purchase of 5600*l.* Navy Stock; and as to the other 5000*l.*, on a mortgage, by *J. Cookson* and his wife, of an estate to which he was entitled in her right; and the mortgage indenture dated 24th *February*, 1785, noticed that *no convenient purchase*

ditaments could be found whereon to invest the same upon the trusts of the will of the said testator and of the said settlement made previous to the marriage of the said *J. Cookson*, and that *Reay* and *Lowes* were desirous to be discharged from the trusts of the settlement, and that *Samuel Castell* and *Charles Wren* had agreed to accept the same ; *the mortgage securities* for the 5000*l.* and 1000*l.* were transferred by *Reay* and *Lowes* to *Castell* and *Wren*, and it was declared, that *Castell* and *Wren* should stand possessed of 5396*l.* Four Per Cent. Annuities (which sum was stated to have been on that day transferred into their names), upon the trusts of the settlement. In fact, this stock was not transferred to the new trustees, for the bankers of the former trustees had, under a power given to them, previously sold out that stock, and misapplied the proceeds.

John Cookson died in 1802, without having had issue, and left his wife, *Hannah Jane*, surviving him.

By an indenture dated the 23d of *July*, 1804, and made between the said *Hannah Jane Cookson*, widow, and the said *Isaac Cookson*, of the one part, and *Samuel Castell*, the survivor of the said new trustees, of the other part, after reciting the marriage settlement of 1784, and therein the said will and testamentary paper, and the said mortgage and further charge to secure the said sums of 5000*l.* and 1000*l.* to the trustees of the settlement, and the appointment of new trustees by the deed of 1792, and reciting the death of the said *John Cookson*, the son, without leaving issue, by reason whereof the said *Isaac Cookson*, or his representatives, would, upon the death of the said *Hannah Jane Cookson*, become entitled to the actual receipt of the said sum of 1000*l.* trust-moneys ; and reciting that *Castell* had received payment of the said sums of 5000*l.* and 1000*l.*, secured upon mortgage of the hereditaments and premises before mentioned, and that the said sum of 5326*l.* 4 Per Cent. Annuities was

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then standing in his son's name, and reciting that the said *Hannah Jane* and *Isaac Cookson*, being the only persons then interested in the said sum of 10,000*l.* trust-monies, had, with the concurrence and approbation of *Castell*, agreed to nominate and appoint two other persons *to act in conjunction with the said Samuel Castell in the several trusts then remaining unexecuted and capable of taking effect relative to the said sum of 10,000*l.*, which were by the said indenture of appointment of 23d February, 1784, expressed and declared concerning the same*, and had in consequence requested *Joseph Cookson* and *Anthony Surtees* to accept the same trusts, and to act therein in conjunction with *Castell*, which they had agreed to do, the said *Hannah Jane* and *Isaac Cookson* covenanted with *Castell*, his executors, &c., to transfer the said sum of 5326*l.* 4 per Cent. Annuities into the joint names of the said *Castell*, *Joseph Cookson*, and *Surtees*; and they, *Hannah Jane* and *Isaac Cookson* thereby directed *Castell* to make such transfer, and also *forthwith* to place out and invest upon real and Government Securities the said sum of 6000*l.* so lately received by him, and then in his hands, *in the joint names of the said Castell, Cookson, and Surtees*; and it was thereby declared and agreed, by and between the said parties thereto, that the said sum of 5326*l.* 4 Per Cent. Annuities, when so transferred, and the said

be chargeable with such monies as they should respectively receive; and that they should not be accountable for the insufficiency or deficiency of any securities.

Castell did not transfer the 5326*l.* stock (which had, in fact, been previously sold and misapplied, as before mentioned), but he, together with *Joseph Cookson* and *Surtees*, lent the 6000*l.* to *Isaac Cookson*, upon the security of a mortgage of an estate belonging to him, and it remained upon that security until after his death.

Some time after the discovery of the fraud about the sale of the said stock, *Isaac Cookson* and *Hannah Jane Cookson* instituted a suit in Chancery against *Henry Ulrich Reay*, the surviving trustee of the marriage settlement, and the representatives of the bankers who had so sold out the stock, praying to have it declared that the plaintiffs were entitled to have the said sum of 5326*l.* stock replaced, or the produce thereof laid out upon the trusts of the said marriage settlement. This suit coming on for hearing in July, 1809, it was decreed that *Isaac Cookson*, by his counsel, electing to take the sum of 5339*l.*, the money produced by the sale of the said stock, instead of having the same replaced, and *Hannah Jane Cookson*, by her counsel also electing to take the interest of the said sum, the defendants should pay what should be found due for interest to her, and what should be found due for principal into the bank, to the credit of the cause; and it was ordered that the same, when paid in, should be laid out in the purchase of Bank 3 Per Cent. Annuities.

In pursuance of this decree and subsequent proceedings, the sum of 8502*l.* 3*s.* 2*d.* Bank 3 Per Cent. Annuities, was purchased in the name of the Accountant General, in trust in the cause; and by an order on further directions, dated the 12th January, 1811, it was ordered, that the interest and dividends thereof should be paid to *Hannah Jane Cookson* during her life.

The said *Isaac Cookson* died in December, 1831, intes-

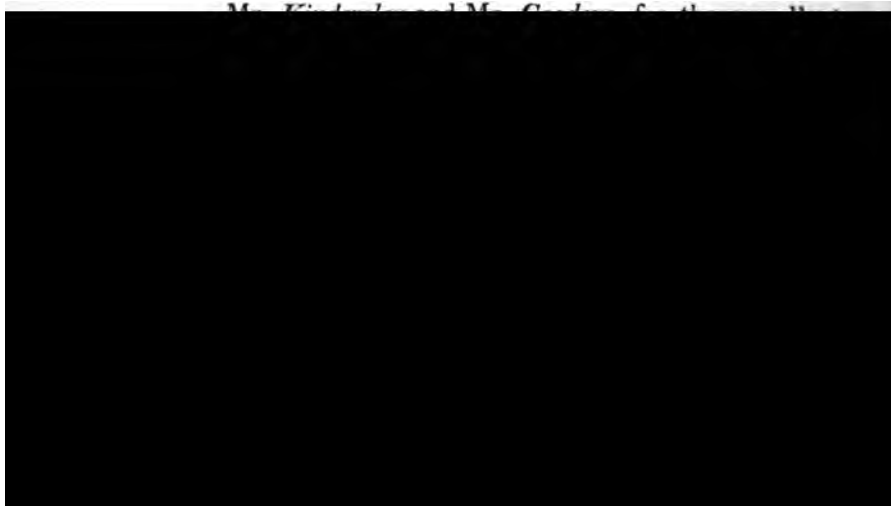
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tate, leaving eight children, namely, *John* (the appellant) his eldest son and heir at law, and the respondents, *Isaac Thomas, Joseph, Elizabeth*, wife of *Robert Surtees*, and *Emma*, wife of *Robert Bell*, and *James and Christopher*, both since deceased. Administration of the intestate's estate and effects was granted to the appellant and the respondent *Isaac*, and to another son, since deceased. *Hannah Jane Cookson*, the widow of *John Cookson*, died in April, 1841, having received the dividends of the 8508*l.* 3*s.* 2*d.* up to the time of her death.

In 1842 the respondents, who were the only parties, except the appellant, interested in the personal estate of the deceased *Isaac Cookson*, presented a petition to the Master of the Rolls in the cause of *Cookson v. Reay and others*, praying that the said sum of stock might be transferred to the appellant and the respondent *Isaac Cookson* as the surviving administrators of the estate of their father. The Master of the Rolls, after hearing that petition, made an order on the 29th of April, 1842, directing the transfer of the said sum of 8508*l.* 3*s.* 2*d.*, as prayed (*a*).

The appellant, conceiving that the transfer of the stock ought to be made to himself, as heir at law of the said *Isaac Cookson*, brought this appeal against the said order.



converted into personalty; and the Master of the Rolls held that it was, but he did not give a decided opinion (c).

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The testator's instructions, annexed to his will, clearly indicate an intention that the money should be vested in land: "As to my son *John*, I would have 250*l.* per annum paid to him until a sum of 10,000*l.* can be invested in land, or some other securities, which is to be vested in trustees for his use, as to the interest of such money or produce of such lands for his natural life; and if he marries, &c., that he make such settlement on such wife, &c., and that the remainder may go to such child or children he may have, &c.; but in failure of these, to my eldest son, *Isaac*, and his heirs for ever." These directions for investment and settlement are applicable to real estates only:—

[Lord *Cottenham*.—The limitation to *Isaac* and his heirs implies real estates, but the limitation of the remainder to *John's* children would imply personalty, "remainder" being taken to signify, not a remainder after a life estate, but what would remain of the property after the settlement on *John's* wife.] That would be an unusual and inapt construction of "remainder." A limitation to *John* and his children does not necessarily imply personalty, because that would pass by being given to *John* himself, and "children" may be construed "issue," *et vice versâ*; *Preble v. Boghurst* (d). A limitation to one and his heirs is applicable to realty only, and it is a settled rule in equity that when money is directed to be invested in land or upon other security, the direction to invest the money in land is not matter of discretion, but is imperative; and an investment of it in other security is to continue only until a purchase can be made of lands; *Earlom v. Saunders* (e), *Johnson v. Arnold* (f), *Cowley v.*

(c) 5 Beav. 33-4.

(e) Amb. 241.

(d) 1 Swanst. 332.

(f) 1 Ves., sen. 169.

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Hartstonge (g). In none of these cases was the language directing an investment in land, &c., so strong as the will here, and the marriage settlement of *John*, the son.

It was evidently the testator's intention that if *John* died without leaving a child, the benefit of the 10,000*l.* should go to *Isaac* and his heirs, subject to the settlement on *John's* wife; but if the money was personalty, *John*, if he had a child who lived but one hour, would, as that child's personal representative, take the whole, and so-thing would remain to *Isaac* or his heirs; so that the testator's intention in regard to them would be defeated:—

[Lord *Cottenham*.—Suppose *John* left several children, what estate would they take in realty?] If it were necessary, in the events that happened, to define the estates that they would take, several ways might be stated in which they might take without defeating the ultimate limitation to *Isaac*. [Lord *Campbell*.—State them.] All the children might take as tenants in common for life, with or without cross-remainders; or a limitation might be to the eldest, and other sons successively in tail, remainder to the daughters in tail, in all which the ultimate limitation to *Isaac* and his heirs would be secured. The directions for the settlement here were incomplete and executory, being declared by the testator himself to be only “instructions;” and in such cases, it is a settled rule that the Courts will consider the intention, and direct a settle-

to give effect to the ultimate limitation to *Isaac* and his heirs; *White v. Carter* (*h*), *Preble v. Boghurst* (*i*), *Stonor v. Curwen* (*j*), *Fearne Cont. rem.* (*k*). In *Jervoise v. The Duke of Northumberland* (*l*), Lord *Eldon* says, "Where there is an executory trust, where the testator has directed something to be done, and has not himself, according to the sense in which the Court uses these words, completed the devise in question, the Court has been in the habit of looking to see what was his intention; and if what he has done amounts to an imperfection with respect to the execution of that indenture, the Court inquires what it is itself to do. And it will mould what remains to be done, so as to carry that intention into execution." And Sir *A. Hart*, V.C., in *Woolmore v. Burrows* (*m*), says, "It often happens that the Court is called on to expound a meaning, and execute a purpose which the testator himself could not have explained in their detail; and the Court is then driven to the necessity of giving such directions as it conceives to be nearest to a probable and rational purpose in the testator's mind."

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It is to be observed, that the instructions as to the testator's son *Joseph*, were "to fix the like 10,000*l.* in the same manner, to prevent its being spent." This fixedness of the fund could be secured only by permanent investment in land, and that construction is further borne out by the last instruction, to lay out all surpluses beyond expences "in mortgages or purchases for the purposes above mentioned."

It being manifest, on the true construction of the instructions, that the provision of 10,000*l.* for *John* was converted into real estate, what acts and dealings of the parties have re-converted it into personalty? because, if

(*h*) Amb. 671.

(*i*) 1 Swanst. 329.

(*j*) 5 Sim. 264.

(*k*) pp. 90, 112, 137 (Butl. ed.)

(*l*) 1 Jac. & W. 570.

(*m*) 1 Sim. 525.

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a discretion or election is given to a party interested in a fund to change the character once impressed upon it, the acts or expressions declaratory of such intention must be clear and unequivocal, *Stead v. Newdigate (n)*. The discretion given to the testator's wife with regard to the settlement to be made by *John*, was confined to the provision for his wife; and the direction for further limitations in that settlement was absolute—at least the discretion given in regard to that settlement vested in the widow, and in *John*, and *John's* intended wife, or some of them; and such discretion was fully exercised by the marriage settlement of 1784, to which these three were parties, and which adopted the expressions of the testamentary instructions, and must be construed in like manner. By this settlement *John Cookson* covenanted to raise the 10,000*l.* out of his father's assets, and pay it to the trustees, "in trust to lay out the same in the purchase of freehold lands, so soon as a convenient purchase should be found, to be settled to the use of *John* for life, remainder to the use of his intended wife for her life, remainder to the children of the marriage"—clearly the whole *corpus*, and not a part only, was thus settled on the wife; and after her death on the children of the marriage, consistently with the testamentary instructions, and in the usual form of such settlements,—“for such estate and in such

converting it into personalty, fully sustains its character of realty before impressed on it. By their subsequent acts, one half of the sum was vested in the funds, and the other half on mortgage of real estate, the mortgage deed reciting that "*John Cookson* had paid the 10,000*l.* to the trustees, but that no convenient purchase hath yet been found whereon to lay out and invest the same." The deed of 1792, substituting new trustees of the marriage settlement, contained a similar recital, and both deeds shewed that there was no deviation by these parties from the original intent of the will to invest this money in land.

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After the death of *John Cookson* without issue, a deed, dated *July*, 1804, was executed by *John's* widow and *Isaac Cookson*, the only parties then interested in this fund. As it was upon this deed that the Master of the Rolls founded his opinion (*o*), that the property was reconverted into personalty, it demands careful consideration. It was executed by the parties in virtue of their ownership, and not under any power; and the purpose of it was to appoint two new trustees to act with the survivor of the trustees, who were appointed by the indenture of 1792, in place of the trustees named in the marriage settlement of 1784. It recites all the prior deeds, particularly the settlement of 1784, and therein the will and testamentary instructions of *John Cookson*, the grandfather; and it expressly adopts all the provisions of that settlement (*p*), and consequently its first and leading trust is to vest the money in land so soon as a convenient purchase could be found, that being one of the several trusts relative to the sum of 10,000*l.* then remaining unexecuted. The expressions used by the parties in this deed are entirely opposed to any intention to determine that trust, and substitute a provision that the fund should be held as personalty for them, a change which certainly

(*o*) 5 Beav. 32.


(*p*) *Vide supra*, pp. 123 & 126.

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they had full power to make, and which, if intended, would naturally have been directed by them in a few plain words, not open to doubt or question, and would not have been left to be collected from circuitous expressions, ill adapted to convey such intention. What was the object of reciting the passages in the prior deeds relating to the investment of the money in land, but to shew that the character of realty impressed upon it was to be continued? If *Isaac*, who was entitled to the reversion of the whole on the widow's death, intended the fund to be considered as personalty, would he not have expressed such intention?

It is said, in *Pulteney v. Earl of Darlington* (q) and other cases, that the slightest indication of intention is sufficient; but in *Stead v. Newdigate* (r), Sir *W. Grant* says, "the onus lies on the defendant to shew, with reasonable clearness, that the testator meant to pass it under a different denomination; it is not enough to fix upon an ambiguous expression or an equivocal direction." There is no expression of intention by *Isaac*, nor even an inference of intention, to be found in this deed to consider this fund as personalty; and to hold that it was by this deed reconverted into personalty would be contrary to all the authorities on the subject.

The only other act of the parties—*Isaac* and *Hannah*—relating to this, was the bill filed by them in 1809, against



intention to have the money vested in land. The Master of the Rolls overlooked this, and relied on the deed of 1804.

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Looking at the will alone, we submit that the character of realty was thereby impressed upon this sum of 10,000*l.*, and if not by the will, then by the settlement of 1784, in pursuance of the power given by the will, and if not by both these instruments, separately or together, at all events by the subsequent deeds and acts of the parties, never indicating an intention to treat the fund otherwise than as realty; and therefore, upon the death of *Hannah*, the heir of *Isaac*, who had previously died intestate, became entitled to the property as realty; *Symons v. Rutter* (s), *Lechmere v. Earl of Carlisle* (t), *Walker v. Denne* (u), *Wheldale v. Partridge* (v), *Thornton v. Hawley* (w).

Mr. *Bethell* and Mr. *Turner* for the respondents.

It is impossible to collect from the will and instructions an imperative direction to vest the money in land. The testator was evidently solicitous to have the money properly secured "to prevent its being spent;" the expression used respecting the provision for his son *Joseph*, but whether in land or other securities, he left to the discretion of the trustees. In order to impress the money with the quality of real estate, it must be shewn that an intention to convert it into real estate was either expressed or necessarily inferible from the nature of the limitations to which the fund was subjected, as in *Cowley v. Hartstonge* and other cases that have been cited (x). As no such intention is expressed in this testamentary paper, those cases do not apply; and as all the purposes of the limitations contained in it may be effected, as well by an in-

(s) 2 Vern. 227.

(t) 3 P. Wms. 211.

(u) 2 Ves., jun. 170.

(v) 8 Ves. 235.

(w) 10 Ves. 129.

(x) *Supra*, p. 129.

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vestment in personalty as in realty, no irresistible or even probable inference, in favour of a constructive conversion arises from the nature of the limitations, for in all cases in which Courts of Equity hold money to be converted into land, the quality of land must be imperatively fixed on the money: "where by will, the will, where by contract, the deed, must decisively and definitively fix upon the money the quality of land," an expression first used by Lord *Loughborough* in *Walker v. Denne* (y), and repeated in another form by Lord *Alvanley* in *Swann v. Fonner-eau* (z), and by the Vice Chancellor in *Davies v. Good-hew* (a). But here the testator has not indicated any definite intention to vest this gift in real estate, "but has left it perfectly at large," as was said by Lord *Loughborough* in the same case. Indeed, it is incredible that this testator, who gives his real estate absolutely to his first son, without any limitations, should create an entail in a sum of money given to his second son. And if this money were to be vested in the purchase of real estate, how could that estate be settled on *John* and his children, so as to secure the ultimate limitation to *Isaac* and his heirs. If limited to *John's* sons in succession, the first son attaining the age of twenty-one, might, by joining his father, defeat that limitation.

The quality of the fund, as determined by the testamen-

tary paper, was expressly saved by the settlement of 1784

that purpose only. She had no power to elect whether the fund should be money or land. If that deed had made the fund money, it would go to *John's* children absolutely; if realty, it could not be settled to uses, so as to preserve the ultimate limitation to *Isaac*.

Suppose the fund had previously acquired the character of realty under the will, or the deed of 1784, it lost that character by the subsequent dealings of the parties with it by the deeds of 1792 and 1804, treating it as a money fund, contemplating its continuance and distribution as personalty, to which, as its original natural character, it would readily return, in obedience to a less decisive indication of intention, than is required to invest real or personal estate with an opposite and artificial character. By the deed of 1792, appointing new trustees, the money was vested in them and treated as personal estate, to which *John Cookson* and his personal representative would be entitled on the death of *Hannah Cookson*. In the deed of 1804 there is a clear indication of intention expressed of taking the fund, as it then existed, in money, and it is not disputed that *Isaac* might then, if he wished, declare that to be its character. He and *Hannah* were then the sole and absolute owners of the fund, and the slightest indication of intention to elect to take it as money, would be sufficient to give it the quality of money: *Chichester v. Bickerstaff* (b), *Lingen v. Sowray* (c), *Bowes v. Earl of Shrewsbury* (d), *Edwards v. Lady Warwick* (e), *Pulteney v. Earl of Darlington* (f), *Trufford v. Boehm* (g), *Crabtree v. Bramble* (h), *Stamper v. Miller* (i), *Curling v. May* (j), *Triquet v. Thornton* (k). On the authority of

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(b) 2 Vern. 295.¹

(c) 1 P. Wms. 172.

(d) 5 Bro. P. C. 269.

(e) 2 P. Wms. 171-4.

(f) 1 Bro. C. C. 223; S. C.

7 Bro. P. C. 530.

(g) 3 Atk. 449.

(h) *Id.* 680.

(i) *Id.* 212.

(j) Cited 3 Atk. 255.

(k) 13 Ves. 345.

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these cases, even if the money had been before converted into realty in equity, the conduct of the parties absolutely interested shewing their acquiescence in continuing it, as it actually existed, determined it to be a money fund. If there was still any room to doubt the character of the fund, its character of personalty was fully established by the decree in 1809.

Mr. *Kindersley*, in reply, urged again that the words of the testamentary paper, directing the investment in land, were imperative, and that neither to the testator's widow, nor to *John*, the son, nor to the trustees, had any discretion been given, and therefore the true inference was that no other person taking an interest in the fund had a discretion to take it as land or money. By some of the cases cited for the respondents, as *Lingen v. Sowray* (l) and *Edwards v. Lady Warwick* (m), money directed to be laid out in land is to be taken as land, even as to collateral heirs. The character of realty impressed on this fund from the beginning was preserved by the deed of 1784, and in no way altered by the subsequent deeds or other dealings with it by the parties. The argument that, by considering the money as real estate, no settlement could be made that would preserve the ultimate limitation to *Isaac's* heirs,—inasmuch *John's* eldest son, on attaining twenty-one might join his father in destroying the entail—cuts both ways.

party has declared a certain intention or not, to be a fact: but that is the matter for our consideration, being the ground, in truth, upon which this question was decided in the Court below, and the ground upon which I am prepared to advise your Lordships to affirm the decree.

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The matter in dispute being whether this fund is to be considered as land or as money, as real or as personal estate, the first question that arose was, whether, in the original gift—which is the original constitution of the fund—the instructions of *John Cookson*, by his will of 1774, whether those instructions accompanying that will gave the fund in question as land, directing it to be invested in land; and whether, taking the whole of that instrument and these instructions together, your Lordships are called upon to say that he had made it land.

I observe that when the Master of the Rolls disposed of this case, he at first said (*n*) that he inclined to think upon the authorities of *Earlom v. Saunders* (*o*) and *Cowley v. Hartstonge* (*p*), “that whatever benefit the children were to take was to be in the form of an interest in real estate.” He inclined to think that that was the object of the whole instructions, and that the alternative given of laying the money out in any other fund—namely, land or some other security, the interest of such money, or the produce of such land, to go so and so—that that was to be taken to be only while they were looking out for an investment, but that the object was to invest it in land.

Certainly, if you take the whole together, there are indications of an intention that it should go in land. The word “remainder” is used, which may mean residue only, but yet it is more technical than that; then, “in failure of those”—that is to say, of child or children lawfully begotten—it is to go “to my eldest son *Isaac*, and

(*n*) 5 Beav. 30.
 (*o*) Amb. 241.

(*p*) 1 Dow, 361.

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his heirs for ever," which is very seldom used, and very inaccurately, except as to land. But taking the word "remainder" and the words "heirs for ever" together, that probably was the ground upon which the Master of the Rolls, with a view to those former cases, considered that it was to be taken as land in the original intention of the party making the gift. I must say that I do not feel anything at all like a clear opinion upon that, but I rather consider that it might be maintained that it was an option given to all intents and purposes, and not merely given as a power to lay it out in money while they were looking out for an investment; for when you come to look to the cases to which his Lordship refers, and there are a great many others, but those perhaps are the two most referred to; and there is also *Johnson v. Arnold* (g); in these cases, and particularly in *Earlom v. Saunders* (r) and *Johnson v. Arnold*, you will find a far clearer indication of the intention to lay it out in land than anything that is to be found here; for what was *Earlom v. Saunders*? First, the testator had given a landed estate in *Surrey*, which he had devised in strict settlement, in terms that could have no possible application to anything but land. He then directs 400*l.* to be raised, not from that estate, but from his other funds unconnected with that estate, to be laid out in land, or such other security as his trustees appointed thereby should think fit or convenient. And how is it to be dealt

says, "it is perfectly clear the only way to make this devise of money consistent was to suppose it was to be laid out in land, for the money was to go to such uses—namely, in strict settlement—as the land that had been devised."

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Then take the other cases. To say nothing of *Cowley v. Hartstonge*, there is the case of *Johnson v. Arnold* (s), which is a very strong case indeed; for it is, that if *George Jackson* should be willing and desirous to have the sum raised laid out in land, then he may purchase in land, and the profits thereof to be for his life, then to his wife for life, and then to his eldest son; and there being no issue male of him, then to his other sons, then, there being no issue male, to his daughters; and if the land should not be purchased, and the money should remain as stock, then to such uses as if lands had been purchased. Really one only wonders that any doubt should have arisen there, because it seems, just as Lord *Hardwicke* says, a devise of profits, as if it had been a devise of land.

Now, there are other cases of another kind, in which the Court would not hold it to be land at all; for instance, *Curling v. May*, cited in *Guidot v. Guidot* (t). In that case the interest is to be laid out in land, or put out upon good security, for H., her heirs, executors, and administrators, and Lord *Talbot* held that the Court would not *in dubio* interfere; that there was here nothing to shew positively what the testator's intention was. There are other cases to the same effect.

If I were to decide this case upon this ground alone, therefore, regarding those former cases as far stronger for land than the present case in every respect, I should feel some difficulty in abiding by the decision that it was land, upon the ground of those former cases, I should feel great

(s) 1 Ves., sen. 169.

(t) 3 Atk. 265.

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doubt whether, even upon the first intention which the testator indicated—namely, in the instructions accompanying the will—I should feel a grave doubt, notwithstanding those cases, whether it was not still left free from any expressions of intention to invest it in land. However, I admit that the word “remainder” and the words “heirs for ever” may, to a certain degree, support, I will not say the decision, that it is land, but an inclination of opinion that it is, as his Lordship, the Master of the Rolls, expressed it; although, when you come to look at a subsequent part of his opinion, he says (*u*), “that even if it were originally impressed with the character of land (which is somewhat weaker than saying that such was the inclination of his opinion), he is of opinion that, at the time *Isaac* executed the deed, he had the right to consider it as land or money.”

But now we come to that upon which really the decision of the case turns, although I thought it right to say a few words upon the former cases, because this is a case which is very often occurring, and there ought to be no more doubt than is necessary left upon the subject—we now come to the other point, which is the manner in which the party dealt with the money. When you come to look at the instrument of *July*, 1804, in which there was to be an appointment made of new trustees, and when you look at the latter part of the recital there, it is a very

ceipt of the said sum of 10,000*l.*:" and then it goes on to other matters, which it is unnecessary to state. Then the witnessing part of the deed is that *Hannah Jane Cookson* and *Isaac Cookson* do hereby for themselves, &c., covenant and promise, &c., "that it shall and may be lawful to and for him or them forthwith, and as soon as conveniently may be, to transfer in the books of the Governor and Company of the Bank of *England*, kept for that purpose, the said sum of 5325*l.* 19*s.* 8*d.* into the joint names of them the said *Samuel Castell* and *Joseph Cookson* and *Anthony Surtees*, and they the said *Hannah Jane Cookson* and *Isaac Cookson* do hereby direct, order, and appoint the said *Samuel Castell*, his executors or administrators, to make such transfer accordingly." Now *Isaac* at this time had an undoubted right to deal with the land, and to say that he took it as land, or to say that he took it as money. The question is, what he does with it. "And they do also hereby further order, direct, and appoint the said *Samuel Castell*, his executors or administrators, forthwith, and as soon as conveniently may be, to place out and invest upon real or government securities the said sum of 6000*l.*, so lately received by him and now in his hands, in the joint names of them, the said *Samuel Castell*, *Joseph Cookson*, and *Anthony Surtees*: and it is hereby declared and agreed by and between the said parties to these presents, that the said sum of 5325*l.* 19*s.* 8*d.* Four Per Cent Annuities, when so transferred, and the said sum of 6000*l.*, when so placed out and invested;" now observe, "and all interest, dividends, and proceeds thereof," which is dealing with it as money exactly, "respectively in the mean time shall be upon such and the same trusts, and to or for such and the same intents and purposes," and so forth, and subject to the same limitations as in the settlement of 1784.

Now I entirely concur with the Master of the Rolls that this is a taking of the fund, that *Isaac* having an

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entire right so to do by this deed, takes this as money, and exercises his own discretion, and indicates his own intention. All that you want here is to know the intention: he had a right to take the money as such if he chose so to do: did he or did he not intend to take it as such? have we or have we not a sufficient indication of that intention? That is the point and the sole point, and looking at this, I think he indicates that intention.

But, my Lords, I do not think that is the whole of this case, and I think when you come to look at what subsequently took place, one might say that this intention is even more strongly stated, although it is not adverted to in the judgment of the Court below, being probably thought superfluous, and unnecessary to support the judgment. In the respondent's case we find the suit stated, and the particulars of that suit, which was instituted by *Isaac* and *Hannah Cookson* against the trustees and the bankrupt's assignees; that is, after *Samuel Castell*, who had the custody of the fund, had become bankrupt; and we find a decree of 14th of July, 1809, in which it is said, "the plaintiff *Isaac Cookson*, by his counsel, electing to take the sum of 5339*l.* 6*s.*, the money produced by the sale of the 5325*l.* 19*s.* 8*d.* 4 Per Cent. Annuities, the trust fund in the pleadings mentioned, instead of having the same replaced, and the plaintiff *Hannah Jane Cookson*, by her counsel, also electing to take the interest of

clearly indicated his intention, and has given that evidence of his intention so to do.

I am therefore of opinion, upon these grounds—and as I agree with his Lordship the Master of the Rolls, it is unnecessary for me to trouble your Lordships further—upon these grounds, I am of opinion that the judgment of the Court below in this case should be sustained, and I move your Lordships accordingly that it be affirmed.

Lord Cottenham.—If it were necessary to put a construction upon the will, I should feel that there was great difficulty in distinguishing this case from those which have been cited in support of the argument, that the character of land had been fixed upon the fund, although the terms used are less strong than in any of these cases.

In *Johnson v. Arnold* the facts are so imperfectly stated that it is impossible, with any degree of certainty, to extract from the observation of Lord *Hardwicke* any rule applicable to other cases. In *Earlom v. Saunders*, land had been devised upon trust applicable only to real estate, and the money was to be held in trust with the same provisions and limitations, and the difficulty arose from the direction that the trustees should “lay out the money in the purchase of lands or any other securities as the trustees should think proper and convenient.” Lord *Hardwicke* thought the trusts inconsistent with the supposition that the fund was to be regarded as money, and to reconcile the different provisions he held that the direction to invest in “other securities” applied only to the investment until land could be purchased. In *Cowley v. Hartsonge* the trust was to “invest either in the purchase of lands of inheritance, or at interest, as my said trustee shall think fit and proper,” and the beneficial interest was given in the same sentence as real estate, and in a manner applicable only to real estate. The rule upon which Lord *Eldon* and Lord *Redesdale* acted in that case, appears to be this, that

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where a discretion vested in trustees had not been exercised, the Court would put that construction upon the will which seemed best calculated to answer the testator's intention. In all these cases there was a discretion as to the purchase of land or personal securities, and in all the Court expresses a strong disinclination to give effect to any such discretion which might have the effect of altering the interest of parties: it must be expressly given: the words must be so express and clear, that the design to give an absolute uncontrolled discretion cannot be misunderstood (a).

Expressions used by Judges in many other cases that there must be a clear, manifest, and ultimate intention, that at all events the conversion should take place, must, I think, be conclusive with reference to the principle upon which these leading cases have been decided. All the cases establish this, that where the conversion has not, in fact, taken place, and the interest vests absolutely, whether in land or money, in one person, any act of his, indicating an option in which character he takes or disposes of it, will determine the succession as between his real and personal representatives; and this appears to me to be all that is necessary to determine the present question.

The deed of 1784 I consider as material only as it is referred to by the deed of 1804, because, whatever discretion may have been given to *Elizabeth Cookson* by the will, I think it clear that her being a party to the deed was

The fund, therefore, remained as money, and all parties interested in the property being dead, except the widow of *John*, who was entitled for her life, and *Isaac*, to whom the fund was ultimately given, they joined in executing the deed of the 23d of July, 1804. These two persons had a clear right to give to the fund the character of money, whatever may be the true construction of the will. Any indication of intention would be sufficient for that purpose. What does this deed indicate? It recites, that *Isaac*, or his representative, will, upon the death of *Hannah Jane*, become entitled to the actual receipt of the 10,000*l.*, and that they two were then the only persons interested in the trust funds, and that they had agreed upon the appointment of new trustees to act in the several trusts then remaining unexecuted and capable of taking effect, which are mentioned, expressed, and declared in the deed of 1784; and, after providing for the investment of the funds, it declares, that they shall be held “to and for such and the same intents and purposes, and under and subject to such and the same provisos, conditions, covenants, and agreements as are mentioned, expressed, and declared of and concerning the said sum of 10,000*l.*, in the deed of 1784, or such of them as remain existing undetermined, and are capable of taking effect.” The first trust of the deed of 1784 was to invest the fund in the purchase of land, with the good liking and approbation of *John Cookson* and *Hannah Jane*, his intended wife; but it provides for the construction of the will and testamentary paper, that the money ought not to be so laid out and invested; and, after giving estates to the husband, wife, and children, the deed refers to the will as directing the parties, who, after the expiration or failure of those estates, would be entitled.

The appellant contends that, notwithstanding the recitals before alluded to, the reference in the deed of 1804 to the deed of 1784 adopts and incorporates all its provi-

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sions, including the trust to purchase land; and the question is, whether that be the true construction, or whether the reference to the deed of 1784 was not merely to describe the beneficial interests remaining, namely, the life estate of *Hannah Jane*, and the absolute interest in remainder of *Isaac*. This latter construction is in strict conformity with the recitals, whereas it is inconceivable that these two parties, who had the actual dominion over the fund, should create a new trust for the purpose of investing the money in the purchase of land, which they might effect themselves, and which, if effected, they might immediately defeat by selling.

I cannot adopt this construction, and I think that to make the provisions reasonable and consistent, the reference to the deed of 1784 must be considered as confined to the estates and interests remaining, namely, of *Hannah Jane* for life, remainder to *Isaac* absolutely. Were this more doubtful, I think that the decree of the 14th of July, 1809, would be conclusive. By that decree *Hannah Jane* and *Isaac* agreed to accept a sum of money, to be invested in the purchase of Three Per Cent. Annuities, in the name of the Accountant-General, and the dividends to be paid to *Hannah Jane* for life, with liberty, after her death, for any persons entitled, to apply concerning the said annuities. This was a dealing by the parties interested with the fund as a money fund, and inconsistent with any intention

authorities that were referred to, and I am clearly of opinion that the decree ought to be affirmed.

The heir at law of *Isaac Cookson* is bound to shew that what *de facto* is money, had the character of land impressed upon it, and is now to be considered as land. I must say that I entertain the greatest doubt whether, under the original will, it ever had the character of land impressed upon it. If, looking to that instrument, you see that it was the intention of the party that it should ultimately be vested in land, certainly while it remains upon personal security, it is still to be considered as land.

But I doubt very much whether this testator really meant that it should ultimately be vested in land, or at least whether he gave such directions as made it imperative upon the trustees to vest it in land. He intimated no general intention to create a second family. He had four sons, *Isaac*, *John*, *Thomas*, and *Joseph*. There was a family estate, which he limited to *Isaac*. Then the younger sons were to be sent out into the world, and to have provisions made for them; and there seems no probability whatever that, with regard to the 10,000*l.*, which was to be set apart for *John* or for *Thomas*, that it was intended that there should be a second family established, and that, failing that second family, this minor estate should be converted into land, and should revert to the head of the house.

Then when you look to the words that are employed, it is impossible to put upon them the interpretation that the land was to be merely a mortgage. But, taking the whole into consideration, I should think it more probable that the testator intended that the money should be laid out upon security to remain as personalty, than that it should be converted into realty. There is certainly the word "remainder," but that, in a popular sense, might be applied to personalty. There are also the words "heirs for ever;" they may mean heirs in personalty. There

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are very considerable difficulties on the other side ; I think the learned counsel for the appellant had considerable difficulty in saying what estate the child or children of *John* would take in the land if it had been purchased.

Referring to the cases that were cited, I do not find that any of those cases go the length of deciding that, where the intention of the testator is so very doubtful, you can say that the character of land is to be impressed upon the money, where there is to be a provision under circumstances, such as we find here, and which we have to consider. However, there is no necessity for us to decide that point, because, even if upon the will this sum is to be dealt with as land, there does not seem to be the remotest doubt that the option, which was given that it should afterwards be taken as money, was exercised ; and if it had been once land, it had ceased to be land, and therefore it is now to be considered as personalty, and that therefore the next of kin of *Isaac*, and not the heir at law, are entitled to it.

It is unnecessary that I should attempt to go over the grounds which were gone into by both of my noble and learned friends who have preceded me : I think upon the second point, there is no reasonable doubt whatever, and that alone is sufficient.

It was then proposed that the decree be affirmed, with



JOHN JACK, lessee of the Rt. Hon. }
 GEORGE ROBERT DAWSON and } *Plaintiff in error.*
 of others - - - - - }

1845,
 April 8.

WILLIAM M'INTYRE and ELIZA- }
 BETH his wife - - - - - } *Defendants in error.*

By lease made in 1719 the lessor demised, for three lives, renewable for ever, all that part of the townland of B., containing 509 acres arable, meadow, and pasture, bounded on the south by D., on the north and east with L. N., and on the west with T.'s and W.'s land, with all rights thereto belonging, excepting and reserving all mines, quarries of stone and coal, and all royalties, and all timber above and under ground. There were several renewals of the lease in the same terms as to the contents and boundaries of the demised premises.

*Lease ;
 Construction.
 Admeasurement
 or
 Boundaries.*

Held by the Lords, affirming judgments of the Courts in *Ireland*, that 400 acres of bog and land reclaimed from bog, which were situated within the ambit of the specified boundaries, passed under the lease and the renewals thereof, in addition to the 509 acres arable, meadow, and pasture.



THIS was a writ of error on a judgment in an action of ejectment, brought in the Court of Queen's Bench in *Ireland*, in 1836, by *Jack*, a nominal plaintiff, on the several demises of *George Robert Dawson*, and other persons (who are trustees) against Mrs. *Elizabeth Bell*, who has since married *William M'Intyre*. The facts were these :—

Joshua Dawson, the ancestor of the above named lessor of the plaintiff in error, by indenture of lease, dated the 13th of *August*, 1719, demised unto *John Blair*, his heirs and assigns, “ all that part of the townland of *Ballymaguigan*, containing 509 acres arable, meadow, and pasture, *English* statute measure, for three lives, renewable for ever; bounded on the south with *Derrygarre*, on the north and east with *Lough Neagh*, and on the west with *John Tough's* and *James Wullwood's* lands, situate, lying, and being within the manor of *Castle Dawson*, in the county of *Londonderry*, with all and singular the

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rights, &c., and appurtenances thereunto belonging, excepting and reserving out of said demise all mines, minerals, and quarries of stone and coal," &c., "and all timber and wood above and under ground;" &c., subject to the payment of the rent therein reserved. Several renewals of this lease were subsequently executed, pursuant to a covenant for renewal therein contained; the last and still subsisting renewal, dated the 1st of *November*, 1797, described the subject-matter of demise in the same words; viz., "containing 509 acres arable, meadow, and pasture, *English* statute measure."

The townland of *Ballymaguigan* contains, besides the part comprehended within the above specified boundaries, *Tough's* and *Wallwood's* lands, and a portion of land in the possession of the lessor of the plaintiff himself. These lands lie outside the boundaries of the demised premises, and within those boundaries are contained, in addition to the 509 acres arable, meadow, and pasture, nearly 400 more acres of bog, and cut out or reclaimed bog, interspersed with and surrounded by the arable land, except on one side, where the demised land is bounded by *Tough's* and *Wallwood's* lands, and on one part of another side where it is bounded by *Lough Neagh*. So that the space within the said boundaries measures altogether 905 acres, or thereabouts.

The lessors of the plaintiff, who represent the estate and interest of *Joshua Dawson*, now for the first time claim

The ejectment was brought for the recovery of the bog and cut out or reclaimed bog in the possession of Mrs. *M'Intyre*, then Mrs. *Bell*, widow, and was tried at the *Londonderry* Summer Assizes for 1837, before Mr. Baron *Pennefather* and a special jury. The learned Baron directed the jury that the whole of the land, bog and cut out bog, which lay within the boundaries of the premises demised by the said lease of 1719, passed to the lessee, and those deriving under him, and that if the jury believed that the bog and premises claimed by the ejectment lay within the ambit of the boundaries specified in the said lease, the defendant was entitled to a verdict; to which direction the counsel for the plaintiff took exceptions, to the effect that, according to the true construction of the said lease, nothing passed thereby except 509 acres arable, meadow, and pasture, and that the plaintiff was entitled to a verdict. The jury gave a verdict for the defendant.

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The exceptions were argued in the Court of Queen's Bench, in *Michaelmas* Term, 1840, and judgment was given for the defendants in error (Mrs. *Bell* having, between the verdict and judgment, married *M'Intyre*) (*a*). The plaintiff then brought a writ of error to the Court of Exchequer Chamber, in Ireland, where, by the unanimous decision of the Judges, the judgment of the Court of Queen's Bench was affirmed (*b*).

The present writ of error was brought to reverse those judgments.

Mr. *Kelly* and Mr. *J. W. Smith* for the plaintiff in error.

This is a strictly legal question, and depends on the rules of construction of the terms of a demise. The demise here was of "all that part of the town land of *Ballymaguigan*, containing 509 acres arable, meadow, and pasture, English statute measure." According to the plain construction of this description of the subject matter of demise, 509 acres only passed to the lessee. But there is

(*a*) 3 Ir. Law Rep. 140. (*b*) 5 Ir. Law Rep. 229.

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this addition, "bounded on the south with *Derrygarre* on the north and east with *Lough Neagh*, and on the west with *John Tough's* and *James Wallwood's* lands. Now, within these external boundaries are comprised, besides 509 acres of arable, meadow, and pasture land, 40 more acres of bog and other lands. The ambit of the specified boundaries is not the exact limit of the land demised, and ought not therefore to be taken as the sole criterion, as the Judge at the trial took it, in determining the extent of the demised premises. The true criterion is the number of acres particularly mentioned: that construction would satisfy and give effect to all the terms of the demise. Lord *Bacon*, in his *Maxims*, commenting on the thirteenth rule, says (b), "If I have some land wherein all these demonstrations are true, and some wherein part of them are true and part false, then shall they be intended words of true limitation to pass only those lands wherein all these circumstances are true." That rule of construction is recognized in *Doe v. Lyford per Le Blanc* and *Bayley*, Justices (c), and in *Doe v. Bower, per Littledale* and *Parke*, Justices (d). The latter case is quite applicable to the present; in both cases the rule of construction, which gives effect to all the terms of demise, is fully established.

There is another class of cases, which have decided that where there is a prior limitation and further description, the prior limitation prevails, as in *Woodden v. Osbourn* (e), which is referred to for that distinction by Mr. *Jurman* (f).

In the renewal lease in 1797, when the rights of the parties were better known than at the date of the original lease, the subject of demise is thus described:—"All that and those the said 509 acres arable, meadow, and pasture in the town lands of *Ballymaguigan*, in the said hereinbefore recited indenture." Can any one, reading this

(b) *Maxims of the Law*, 77.
Bac. Works, by Mont. Vol.
 (c) 4 *Mau. & Selw.* 557-8.
 XIII., p. 176.

(d) 3 *Barn. & Ad.* 459-60.
 (e) *Cro. Eli.* 674.
 (f) 1 *Jarm. Wills*, 716.

description, say that not only 509 acres, but the whole contents of the boundaries, were demised? The description of the subject matter by measurement was sufficient; the addition of boundaries—which are seldom pretended to be exact, and known to be wrong in this case—appear to be an after-thought, and ought not to be preferred to the prior description by admeasurement. The demise was of part of the town lands, containing 509 acres; the ambit of the boundaries includes 400 more of bog and waste land, which the original lessor never intended to demise. The true construction is to take the specified number of acres; they lie within the boundaries mentioned, and that construction, therefore, will answer both descriptions found in the original lease.

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Mr. *Napier* and Mr. *Butt* (both of the Irish Bar) appeared for the defendants in error, but were not heard (*g*).

(*g*) The “reasons” subjoined to the printed case, signed by two other Irish counsel, were as follows:—

1. Upon the plain construction of the original lease of the 13th of August, 1719, all that part of the townland of *Ballymaguigan*, comprised within the boundaries specified therein, passed to the lessee.

2. If there was any doubt as to the parcels included in said lease, the ancient and continued possession by the lessee and those deriving under him, for upwards of 120 years, of the bog and all other lands comprised within the boundaries specified in said lease, would furnish, from usage, the contemporaneous exposition of that document in favour of the defendants. Besides which a deed should be construed most strongly against the grantor.

3. The exception contained in said lease of certain matters and rights to the lessor, and amongst others, of all timber and wood *under ground*, applies clearly to timber which is commonly found in the bogs of *Ireland*, but is very rarely found, if at all, in arable, meadow, or pasture lands, and shews that the parties to the said lease intended to pass, and considered that the bog passed to the lessee, otherwise it would be absurd to except the bog timber out of a bog which was not granted.

4. The said lease contains no grant to the lessee of any easement or right of turbary, and, consequently, if the bog did not

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The Lord Chancellor.—If we entertained any doubt with respect to the construction of this instrument, I should think it necessary to recommend your Lordships to hear the counsel for the defendants in error ; but as the noble and learned Lords present do not appear to entertain any doubt, I think we are in a position now, upon the arguments on the part of the plaintiff in error, to recommend your Lordships to affirm this judgment.

If there were any inconsistency between the description of this property, which is the subject of the lease, in the different parts of the lease ; if it were necessary to select one part and to reject another, then we might find it necessary to refer to the rules which have been laid down for the purpose of guiding the judgment of the Courts in cases of this description ; but it does not appear to me that there is any inconsistency whatever between the different parts of this description. It is a demise of all that part of the testator's lands bounded in a particular way. The boundaries are minutely, and, as we must take it, correctly described. All the lands, therefore, contained within those boundaries would pass unless there was some inconsistency between that description and the other part of the instrument.

pass to the lessee, he and his assigns would be for ever without the means of fuel, as the coal, and all timber and wood above or

Now, what is the inconsistency, or the supposed inconsistency, which is relied upon? The passage in which it is stated that it contains "509 acres arable, meadow, and pasture;" it does contain 509 acres arable, meadow, and pasture; and because it has not gone on to describe that it also contains a quantity of bog—400 acres of bog, which at that period was considered as property of little or no value—it is said that that part of the description is inconsistent with the rest. It does not appear to me that it is in the slightest degree inconsistent with it; it is a demise of all that part of the townland, particularly described with respect to its boundaries, containing so much arable, meadow, and pasture; but also containing a considerable quantity of land of another description, which at that time was considered of little or no value. It does not appear to me, therefore, that there is any inconsistency in this description; on the contrary, it is perfectly consistent; and therefore I am of opinion that all that is contained within the ambit, according to the decision of the Court below, would pass to the lessee under this lease, and that the judgment must be affirmed.

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Lord Brougham.—In this case I entirely agree with my noble and learned friend, for the reason he has shortly and satisfactorily given.

This case comes before your Lordships by a writ of error from the Exchequer Chamber in Ireland, before which it was brought by error from the Court of Queen's Bench, before which it came, upon a bill of exceptions to the direction of the learned Judge at the trial. That learned Judge put it to the jury to say whether they believed that the acres of bog for which the ejectment was brought, and which were alone in question, were within the ambit of the boundaries. If they believed they were in point of fact within the ambit of the boundaries, his Lordship directed that they should find for the defendants; and if otherwise, for the lessee of the plaintiff. The jury being of opinion that they were within the ambit, found for the defendants. The exception taken was,

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that the learned Judge ought not so to have left it, but that he ought to have directed the jury, in construing the written instrument upon which it was his province to put a construction, that the 509 acres of arable, meadow, and pasture, alone passed by the demise. That therefore raised the question, whether or not the bog passed, being within the ambit of the boundaries, or whether the demise only passed the portion of the land, which is given by admeasurement as well as by metes and bounds, namely, the 509 acres.

I agree entirely with my noble and learned friend, that, if there be inconsistent constructions set up, and the question is, which satisfies the words, then the rule is undeniable that you must prefer that construction—unless there are some peculiarities in the case to take it out of the general principle and rule—you must prefer that construction, which satisfies the whole, to that construction which only satisfies a part.

But that is not the case here. I am not called upon to make any such selection of construction; because this construction most undeniably is perfectly consistent with the very strictest words of the description of the parcels. It is “all that part of the town land containing 509 acres arable, meadow, and pasture, bounded upon the south,” and so on. In the first place this land is bounded as there described; the external boundary is so and so; it is within that ambit that the jury found, and that is not denied. It

lease in question being granted (1719), it being the usual practice"—now, this is a matter of conveyancing, and a matter known to the learned Judges locally in that part of the United Kingdom—"it being the usual practice to allow the bog to pass with the profitable land described in this instrument as arable, meadow, and pasture. It passed by the law of forfeiture in all the grants of the forfeited estates, and that law was in full force at the time of this lease being executed." That goes very much, in my opinion, to confirm the view taken by their Lordships in both the Courts below, and unanimously, as it appears, in both those Courts.

Such being the ground of the opinion at which I have arrived in common with my noble and learned friend, it is unnecessary for me to go into the cases, such as *Doe, v. Lyford*, or *Doe v. Bower*, because we do not touch those cases: we entirely admit every part of the learning in those cases, only saying that they do not rule this case, and this case stands consistently with those cases.

I therefore wholly agree with my noble and learned friend that there is no case for calling upon the defendants in error, and that the judgment must be against the plaintiff in error.

Lord Campbell.—I agree with the opinion of my noble and learned friends, that in this case it is unnecessary to call upon the counsel for the defendants in error.

We are not driven to apply maxims of law on this subject, or to be governed by any of the technical rules which have been laid down for the construction of grants, in which inconsistent and contradictory language is used. When I look to this lease, I must put upon it its natural and grammatical construction; and, doing so, I have no doubt that it comprehends the place in question, namely, this bog. I read it (as do my noble and learned friends who have preceded me) as a demise of "All that part of the town land of *Ballymaguigan*, containing 509 acres arable, meadow, and pasture, English statute measure." That is all perfectly correct. But why is not all that part of the town lands of *Ballymaguigan* which, bounded by the

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boundaries that are here set out, comprehended in this demise? The only argument is this, that there is bog, and that the bog is not specifically mentioned, and the admeasurement of the bog is not mentioned. But of that there is abundant explanation given that it was of so little value that there was no occasion whatever to mention the bog, or to mention the contents of the bog; it was included in that part of the townland of *Ballymaguigan*, which was comprehended within the line which is specifically pointed out.

Now, I think it is extremely important to observe, that there is no internal boundary. It would have been the easiest thing in the world, if the bog was not to be included, and it would have been the natural thing, to have said that it was bounded on the outside by *Ballymaguigan*, &c., and on the inside by the bog, but, on the contrary, there is no such intimation; and, therefore, all that is included within that external boundary must pass by the demise. I have therefore no doubt at all, that, according to the natural and grammatical construction of the words in this case, that the bog passed by the demise. I conceive there is nothing to rebut that natural construction, because the defendant, the lessee, is in possession, and there is nothing to shew that he and those under whom he claims have not been in possession since the year 1719, when the lease was granted. The lessor of the plaintiff was bound to make

JOHN STOKES and LOUISA STOKES	-	<i>Appellants.</i>	1845.
CHARLOTTE HERON and Others	-	<i>Respondents.</i>	April 11-18.

A will disposing only of personalty contained these words:—"My will is, that whatever I die possessed of, or in any way entitled to, together with whatever property my wife may be any way entitled to, shall produce to my wife an annuity of 100*l.* per annum, to each of my daughters 100*l.* per annum for themselves and their children, and to my wife's mother an addition to any property she may possess, so as to make up to her during her life an annuity of 100*l.* per annum, said annuities, after the decease of my wife and her mother, to be equally divided among my three children, *William, Mary, and Julia Louisa*; all the rest and residue of my property and possessions I give and bequeath to my son *William*." At the date of the will and of the testator's death, his daughters had no children.

*Will.
Personalty.
Annuities;
Perpetual or
for Life.*

Held, that all the annuities thus created were perpetual annuities.

The testator's daughter *M.* died, and after her death he made a codicil to his will, dividing her annuity between his two surviving children, but in other respects confirming the will. His wife's mother having died, he made a second codicil in these words:—"And in case my son *William* shall die without leaving issue male lawfully begotten, my will is that, after the decease of my wife and my daughter *J. L.*, my remaining property shall then be divided between" two relations named in the codicil, and their children.

Held, that these codicils did not alter the nature of the annuities given by the will to *Julia Louisa*.

Where a will clearly establishes a perpetual annuity, the estate in the annuity cannot be restricted, by a codicil, to a life estate, unless the expressions there used are clear and undoubted.

Seemle, that the rule in *Wild's* case (6 Rep. 17), that "if A. devises his lands to B., and to his children or issues, and he hath not any issue at the time of the devise, the same is an estate tail"—is applicable to personalty.



WILLIAM HERON, late of Dublin, esq., deceased, on the 8th of June, 1815, made his will, which was throughout in his own hand writing (executed so as to pass personal

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estate), and which contained, among others, the following clauses :—

“ My will is, that whatever I die possessed of, or any way entitled to, together with whatever property my wife may be any way entitled to, shall produce to my wife an annuity of 100*l.* per annum—to each of my daughters 100*l.* per annum for themselves and their children—to my wife’s mother an addition to any property she may possess, so as to make up to her during her life an annuity of 100*l.* per annum—said annuities, after the decease of my wife and her mother, to be equally divided among my three children, *William, Mary, and Julia Louisa*, but my will is that my wife and her mother shall enjoy their annuities as above for their lives and the life of the survivor of them, so that the survivor of them shall possess an annuity of 200*l.* per annum, to be after the decease of both equally divided between my three children ; all the rest and residue of my property or possessions I give and bequeath to my son *William*.”

Mary Heron, one of the children of the testator, having died after the making of this will, unmarried and without children, the testator, on the 24th May, 1817, made a codicil in the following words :—

“ It having pleased Almighty Providence to take away my daughter *Mary*, it becomes necessary to alter the disposition of my property after my decease as far as relates

issue male, lawfully begotten, my will is, that, after the decease of my wife *Mary*, and my daughter *Julia Louisa*, my remaining property shall then be equally divided between my sister *Anne Owen*, and any daughters by *George Taylor Owen*, her present husband, she may have then living, and my sister-in-law *Charlotte Heron*, widow of my late brother *Edward*, and any children she may have by my late brother *Edward*, then living, share and share alike."

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On the 15th July, 1829, the testator made a third codicil in the words following :—

"If under any circumstances the whole of the property I leave should fail to produce to my son *William* an annuity equivalent to that bequeathed to my daughter *Julia Louisa*—viz. 150*l.* per year, it is my will that the actual amount of income, whatever that may be, shall then be divided into ten equal parts, four of which parts shall be paid to my wife *Mary*, and three parts to my daughter *Julia Louisa*, and the remaining three parts to my son *William*, this arrangement to continue until the income shall afford the full annuities of 200*l.* to my wife *Mary*, 150*l.* per year to my daughter *Julia Louisa*, and at least 150*l.* per year to my son *William*."

The testator died in October, 1831, without having altered or revoked his will or codicils, leaving *Mary Heron*, his widow, and *William*, and *Julia Louisa Heron*, his only children and next of kin him surviving, and leaving only personal property which exceeded in value 10,000*l.*

Mary Heron, the widow of the testator, shortly after his death proved his will and codicils in the Court of Prerogative in Ireland, obtained probate, and possessed herself of all the personal estate and effects of the testator.

In November, 1832, his son *William* died intestate, unmarried, and without issue, and *Mary Heron*, the testa-

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tor's widow, obtained administration of his goods and chattels.

Anne Owen, the sister of the testator, and named in the codicil of the 4th day of July, 1829, died in July, 1832, intestate, leaving two children, *Charlotte Owen* and *Julia Owen*, her surviving, by *George Taylor Owen*, in the codicil named.

After the death of the testator *William Heron*, his daughter, *Julia Louisa Heron*, intermarried with the appellant *John Stokes*, previously to which a settlement, dated 11th November, 1831, was executed, whereby the annuity devised to *Julia Louisa Heron* by the testator, and all properties which she could have or claim under the testator's will, were vested in trustees for her own and her husband's use for life, and then to the issue of the marriage. The appellant, *Louisa Stokes*, was the only issue of this marriage. *Mary Heron*, the testator's widow, and *Julia Louisa*, his daughter and the wife of *John Stokes*, both died in October, 1834.

A bill was filed in the Court of Chancery in Ireland, by the respondents against the appellants, to carry into effect the trusts of the will, the object of this suit being (among other things) to obtain the opinion of the Court on the question, whether the annuities were to be considered, under the terms of the will and codicils taken together, as perpetual or

of the testator had, by the deaths of *Julia Louisa Stokes* and her mother, *Mary Heron*, and the death of her brother, *William Heron*, without leaving issue male, become distributable as part of the residuary property of the testator. This was the decree appealed against.

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Mr. *Kindersley* and Mr. *Bethell* for the appellant.

The first question here is, what interest *Julia Louisa*, the testator's daughter, took under the will and codicils, whether, under the gift to her thereby made, she took a perpetual or only a life annuity. The second question arises under the first codicil, and is this—whether the 100*l.* annuity, which had been intended for *Mary Heron*, the testator's daughter, and which by the codicil, made in consequence of her death, is divided between *William* and *Julia Louisa Heron*, is a perpetual or a life annuity. The third question is, whether the annuity of 200*l.*, constituting the aggregate of the two annuities, is a perpetual or merely a life annuity. The same principle must govern the decision of all these questions. Lord *Plunket* was of opinion that all these annuities were perpetual (c); Lord Chancellor *Sugden* thought that they were only granted for life (d). It is submitted that the view of the matter taken by Lord Chancellor *Sugden* is erroneous.

There can be no doubt that the will taken by itself creates perpetual annuities. Even Lord Chancellor *Sugden* was of that opinion; but he thought that, taking the will and codicils together, the interest created was only for life. The authorities do not warrant this opinion. The case of *Blewitt v. Roberts* (e) shows, that if there is by will a gift of an annuity to A., it is for A.'s life only; but if property is given to produce such annuity, the annuity is perpetual. The difficulty Lord Chancellor *Sugden*

(c) *Heron v. Stokes*, 3 Ir. Eq. Rep. 163. (e) 10 Sim. 491; 1 Cr. and Ph. 274.

(d) 4 Ir. Eq. Rep. 234.

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seemed to feel when this case was before him (*f*), arose from his opinion that the rule in *Wild's* case (*g*) did not apply to personalty. There is no good ground for thus restricting the application of that rule. He thought also that these annuities could not go to the children of the donee on account of remoteness. But the gift is not more remote than when a daughter is directed to take an estate if the descent in the male line should fail. The annuities will, in truth, go to the children as next of kin to the first donees, and they take a more definite interest in such a grant than in the realty. The property must come to them if it is not either previously spent or given away, and the realty may be as easily disposed of in that manner as the personalty. The argument of remoteness cannot therefore affect the question. The case of *Knight v. Ellis* (*h*) has been mistaken when treated, as it was by Sir *Edward Sugden*, as an authority for the proposition that the rule in *Wild's* case does not apply to personalty. Lord *Thurlow's* judgment there does not justify any such conclusion. Nor does that of Lord *Hardwicke* in the case of *Buffar v. Bradford* (*i*); for his Lordship there put the decision upon the time of possession as taking it out of the rule in *Wild's* case, whereas had that rule been deemed by him to be inapplicable to a case of personalty, he would, on account of that inapplicability, have had a shorter and a simpler ground for his decision.

the death of his daughter *Mary*, by increasing the amount of the annuities to be received by the persons who were then living. Twelve years elapsed before he made another codicil; and in the mean time his wife's mother died, but his wife, his son, and his daughter were still living. On this second codicil, however, Lord Chancellor *Sugden* founded his opinion in saying that the intention of the testator had been changed. But the codicil begins with the word "and," which shews that the testator then considered himself as continuing the words of the will; and with the view of providing against contingencies, he declares how, in certain events, his property shall be disposed of, his purpose being that, in the event of those contingencies happening, it should not go merely as accident might direct, but according to intentions and for purposes previously settled in his own mind. [Lord *Cottenham*.—If the codicil cuts down the gift to the children already made in the will, what is to become of the children of *Julia Louisa* after her death; are they to be wholly unprovided for?] It never could have been the intention of the testator to leave them in that state. In one report of the case Lord Chancellor *Sugden* alludes to this subject. After reading the words of the second codicil, he says (*k*)—"This looks as if he thought that *Julia Louisa* was to take for life only, as well as his wife, to whom he had given an annuity expressly for life; and that he considered that when they were removed the remaining property would go to the collateral relations discharged of the annuities." But the "remaining property" thus spoken of in the codicil did not mean property remaining after the death of the wife and daughter, and after their annuities for life had been satisfied. The gift of a certain portion of the property, equal to produce a certain income, satisfies these words, which must apply to the property after that gift has been deducted from it.

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(*k*) 4 Irish Eq. Rep. 288.

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But the great difficulty which Lord Chancellor *Sugden* found in this case, was as to the applicability to personal property of the rule in *Wild's* case. On this subject he gave what he considered a summary of the decisions upon grants of annuity, and perhaps it may be as well to bring that summary to the notice of the House. He said (l)—“Looking at the rule with respect to gifts of annuities, let us see what the effect of the decisions is. *Savery v. Dyer* (m) contains Lord *Hardwicke's* opinion, that where an annuity is given *de novo*, without reference to any particular property, there must be words shewing an intention to that effect in order to pass a perpetual interest in it. That, I take it, is now a settled rule of law. It is equally well settled that a gift of the income of property of which the testator is possessed, carries the entire interest. That was decided in *Elton v. Shephard* (n). So in *Philipps v. Chamberlaine* (o), the gift of the produce of the residue was held to pass the whole interest in it; and in *Page v. Leapingwell* (p), the gift of the dividends of stock was held to pass the stock itself. So a bequest of stock upon trust, to pay the dividends to a party without words of limitation, carries the absolute interest in it, *Haig v. Swiney* (q) and *Adamson v. Armitage* (r). It is settled, also, that where a testator directs an annuity to be purchased for a legatee, the whole interest passes to the legatee, who can elect to take the purchase-money instead of the annuity, *Dawson v. Hearn* (s). So a gift of an annuity, as part of the income of any particular property, passes a perpetuity in the annuity. That was decided in *Rawlings v. Jennings* (t). In the last case upon the subject of annuities, *Blewitt v. Roberts* (u), there was a difference of opinion

(l) 4 Ir. Eq. Rep. 292.

(m) Amb. 139.

(n) 1 Bro. Ch. Cas. 534.

(o) 4 Ves. 51.

(p) 18 Ves. 464.

(q) 1 Sim. & St. 487.

(r) Coop. 283.

(s) 1 Russ. & Myl. 606.

(t) 13 Ves. 39.

(u) 10 Sim. 491; 1 Cr. & Ph.
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between the Vice-Chancellor and the Lord Chancellor upon the subject. The gift of the annuity there did not refer in any manner to any particular property. In every other case there was a gift of the dividends of stock, or of the interest of a residue, or a direction to purchase an annuity, or some other reference to a particular fund out of which the annuity was to come. I know from experience that the opinion of the Vice-Chancellor has always been that a gift of an annuity generally passes a perpetuity, without reference to the distinction which has been taken, and which has always appeared to me to be sound, that when an annuity is given as part of the income of the testator's property, a perpetual interest passes without any express manifestation of intention, because it amounts to a dedication of so much of the property as would produce the annuity; but that when the testator gives an annuity to one *simpliciter*, without any reference to property, then express words, shewing an intention to give a perpetual interest to the annuitant, are necessary. In that case of *Blewitt v. Roberts* there was considerable difficulty. There was nothing but the gift of an annuity, without reference to the particular fund out of which it was to come, and it fell within the rule I have stated, and which has always appeared to me to be the true rule—namely, that unless there be words shewing an intention to that effect, or a reference to a particular fund, nothing beyond a life interest passes.” These observations are not justified by the case of *Blewitt v. Roberts*, nor does that case lay down the rule in the manner here supposed. But even if it did, there is sufficient here, in the terms of the will, to shew an intention to pass the particular fund. Throughout the language of this will the words annuity or annual sum are equivalent to represent and express so much of the *corpus* of the property as will produce that annual sum; and the form of disposition which the testator has adopted is simply that of the gift of the capital of the pro-

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perty through the medium of a gift of the income which he thought it capable of producing. The only reason of difficulty in applying the rule in *Wild's* case to the case of personal property, is that of holding children to be seized of personal property by way of limitation, *Buffar v. Bradford (v)*. That difficulty does not exist under the circumstances of this case ; besides, it need not be held that " children " is a word of limitation, if it can be said that the first taker took for life, and the children take by way of remainder. Lord Chancellor *Sugden* deprived the children of any interest whatever, by holding that *Julia Louisa* took for life only. The disinclination to apply the rule in *Wild's* case to personal property, because the first taker takes the whole, is a little erroneous. Where the word *children* is found in a will, in a gift to a person not having children at the time, it is of itself indicative of an intention to give more than a life interest to that person. If the words of the gift here are not words of purchase, then they must be words of limitation. Lord *Hardwicke* thus stated his reason for the rule which he adopted in *Buffar v. Bradford (v)*—" It must be allowed that ' children,' in its natural import, is a word of purchase and not of limitation, unless it is to comply with the intention of the testator, where the words cannot take effect in any other way ; but suppose a devise was to A,

daughters and their children, I have great doubt as to the possibility of applying the doctrine of *Wild's* case to personal property. The rule there extended the simple gift to an estate tail, because upon any other construction there was no possibility of the children taking the real estate intended for their benefit; they could not take as purchasers, therefore they were held to take it through their father; but where the gift is of personal estate it is just the reverse, for the children can never take through the father in the way they take real estate."

But that is wrong, for if a man gives real estate to A, and his children, they do not take through the father but as a class. His Lordship proceeded to say, "The reason therefore of *Wild's* case not applying to a gift of personal estate, and certainly the true construction of a gift to a father and his children, is to construe it a gift to them as a class, as joint tenants, as in the case of *Oates v. Jackson* (x)." That is true where they can take by purchase, but not where there is a gift to a man who has not then any children. But it is clear that in this judgment of the Court below the decision and the circumstances of *Wild's* case are confounded with the rule of law there stated. Words of purchase are converted into words of limitation in cases of personalty, for the purpose of effecting the intentions of the testator, by allowing an interest to exist where the gift is to a class; and no one of that class is able to take at the time of the gift.

The gift, in the second codicil to *William*, does not alter the previous arrangement of the property, for he can only receive the residue subject to the liability to discharge the burdens previously imposed on the estate, *Bench v. Biles* (y). There the testator directed debts, &c., to be paid, and then went on, "all the rest and residue of my

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(x) 2 Str. 1172.

(y) 3 Mad. 187.

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real and personal estate I give to A. B." It was held that the debts were charged upon the whole, for that there was an implication by the very words of the gift that something had been carved out of the estate before the residue could exist. So, what is given here to *William* he is to take after the preceding bequests have been satisfied. The intention in the will therefore being clear, it is plain to demonstration that the absolute interest thus created cannot be cut down without the alteration of that intention. The wife and daughter here take estates as joint-tenants, with the benefit of survivorship to the longest liver, and the gift over is only to take effect after the death of both. The case of *Robinson v. Hunt* (2) is strictly applicable to the present. There was a bequest of an annuity to A. and B. and the survivor for life, and if A. should have any children the annuity was equally to be divided between them; but if he should die without leaving issue, then over. It was held that A.'s children took absolute interests in a perpetual annuity, the Master of the Rolls saying, that "the only doubt he had was whether the parent took in the nature of an estate tail."

To adopt the construction given to the will and codicils by Lord Chancellor *Sugden* will be to defeat the plain intentions of the testator, and to leave unprovided persons whom he had intended to make the objects of his bounty.

The decree of the Court below must be reversed.

so far as the expression of it is consistent with the rules of law. The cases cited on the other side need not be disputed, they are distinguishable from the present, which must be decided on the peculiar terms of this will itself. The annuities created under the will are not perpetuities. [Lord *Brougham*.—You say then that both the Judges in the Court below are wrong in that respect.] The intention might have been so to create them; but that intention has not been technically carried into effect. [Lord *Brougham*.—It is not on the intention of the testator alone, but also on technical grounds that both the Judges say that the gift of the produce of a fund is the gift of the fund itself, of a part of the *corpus* of the estate, measured by the yearly profits to be derived therefrom. Thus we know that a devise of the rents and profits of land passes the freehold, and a gift of the interest of stock passes the stock.] There is no gift here of the *corpus* of the estate. No specific sum is taken out of the *corpus* of the estate and given to the daughters. Looking to this will, it may be contended that the testator never meant to give more to his wife and daughters than certain annuities, but that he intended to give his son the whole of the property after satisfying these annuities to the full extent. The son might have complied with the will, by paying the annuities out of the interest of the property, without touching the property itself.

The first question which arises is as to the rule of law with respect to the words “to each of my daughters 100*l.* per annum for themselves and their children.” There can be no doubt that the testator meant the benefits of these annuities to extend beyond the lives of the daughters—but how far, is the question. Were they to extend to the children of his daughters, or to their children’s children? The words themselves do not go beyond the immediate successors—the children of the daughters. Will the law construe those words so as to enlarge the interest

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of the daughters, not to give to the children as purchasers, but in remainder? and if so, then will it be in remainder for life or in absolute remainder?

Then the question arises whether the rule in *Wild's* case (*a*) is or not applicable to a bequest of personalty. It is not applicable here, for here the remainder of the personal property is not given to the children. In that case too, the children were in *esse* at the time of the will. [Lord *Campbell*.—The rule in *Wild's* case, which is now the subject of discussion, is one of those many rules that are to be found in *Coke's* reports, and many of which he is supposed to have invented. Lord *Brougham*.—The point does not arise in that case itself; it is obtruded there. But that is not the first case in which the rule was stated, for in *Bendloe's* reports is given a note of another case (*b*) in which the point was decided, and there it was not obtruded—it was the very question in the case.] The authority of the rule in *Wild's* case is not denied, but Lord *Plunket* mistook the decision as to its applicability to the present case. Lord Chancellor *Sugden* was right in saying that the rule in that case did not apply to bequests of personalty; for it may be that the law may not be able in such bequests to carry out the intentions of the testator for the benefit of the children. *Buffar v. Bradford* (*c*) is in support of that opinion, and *Robinson v. Hunt* (*d*) has nothing to do with the question. In what manner does

nuities, originally created for life, are, after the deaths of the annuitants, to be apportioned out among other persons. Again, in the second codicil, the testator drops the mention of the children, which shews that the bequest was not of perpetual annuities, but that the bequest was merely clothed with trusts for the benefit of the children, when the annuities themselves were in the possession of the parents.

The produce of property is a technical expression. Before knowing what the testator meant by using it, the Court ought to have been informed of what his property consisted. It consisted of leasehold houses and of annuities for lives, the value of which was daily diminishing, a fact which materially conduces to put upon the bequest a limited interpretation. There can be no doubt that in the second codicil the testator meant to cut down the interest given by his will to his son : he, therefore, meant to make a change in the dispositions of the will. What is there to shew that that change was meant to be restricted to the interest of the son ; or that it was not meant to be extended to the gifts to the daughter ? The words "my remaining property" in the codicil cannot be considered as a continuation of the gift of residue in the will, for when the codicil was made the testator's intentions had altered. [Lord *Campbell*.—Why should "my remaining property" in the codicil have a more extensive application than the words "the rest and residue of my property" in the will ?] Because in the will there was an intention to grant a perpetual annuity ; in the codicil there is a limitation of it to the life of his daughter. [Lord *Cottenham*.—Suppose the son was to die without issue male, leaving his sister alive, who would take the property ?] The next of kin of the son. The son has an estate in tail-male, but it is in personal property ; and therefore his interest amounts to an absolute estate.

There is not much to be said about the last codicil.

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The testator in that seems to have adverted to the possibility of his property being materially diminished at the time of his death. But it is in the preceding codicils that his final disposition of that property is to be found; and the expressions used there clearly shew that the annuities given to the daughters were not to be taken as perpetuities, as so many gifts out of the *corpus* of the estate, but merely as life interests, determinable on the lives of the donees.

The decree of the Court below must, therefore, be affirmed.

Mr. Kindersley replied.

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Lord Brougham.—My Lords, in this case, which arises upon the construction of a will not very artificially framed—apparently drawn without professional assistance—the question, and the only question before your Lordships, brought here by appeal from the decision of the present Lord Chancellor of Ireland, reversing a decree of the late Lord Chancellor of Ireland, arises upon the interests taken by certain legatees, annuitants under that will, with three codicils thereunto annexed. The question is, whether or not the annuities taken under those gifts in the will and codicils are in perpetuity, or for the lives of the grantees (legatees) only.

My Lords, this case appears to have undergone great consideration below, to have been fully argued in the first

If you affirmed the decision, and gave judgment for the respondents, you concurred in a judgment negating the doctrine laid down, and refusing to adopt the conclusion arrived at by Lord *Plunket*: if, upon the other hand, you reversed the decision, and gave your decision for the appellants, you equally (though affirming the decision of Lord *Plunket*) reversed the decision of a learned Judge of high station in the Court below, the present Lord Chancellor. For these reasons the judgment to be given became matter of anxious deliberation with your Lordships, both during the argument and subsequently at its close; and your Lordships naturally took time to consider which of the two decrees you should pronounce, beset as each course was with considerable difficulty.

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I must say, however, that the difficulty which I have now stated is the only one which, upon a full consideration of the matter, I have been able to find embarrassing our proceedings; for when you come to construe this will, with its codicils—when you examine the instrument itself, and the authorities which have been appealed to—I really do not consider that it is a doubtful matter which way the testator intended, and which way you must conclude and decree, that the annuities should be enjoyed by the legatees.

My Lords, when you look to the first position laid down in both the judgments below, you find additional reason for holding that it is clear and free from all reasonable doubt, which conclusion you should adopt. Here there is no difference between those learned Judges, except as to the grounds of their opinion; for both have arrived at the same conclusion upon that which I hold to lie at the foundation of this case, and to be most important, indeed to be decisive of the question—namely, the interest given by the will itself, which here, as in all such cases, is more or less to be taken as the primary and governing instru-

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ment. Both the learned Judges agree as to the interest given by the will itself, and which would most undeniably have been admitted to be taken by the legatees if the will had stood alone, no codicils being annexed to it. It is very material to find, and very comfortable to those who have now to decide the case, that both those learned Judges held that the will by its constitution gave a perpetuity in the annuities; both agree that this perpetuity must have been taken under the will had there been no codicil afterwards to alter or explain it. It is true that the two learned Judges arrived at this conclusion by different paths. Lord *Plunket* held that it rests mainly upon the rule in *Wild's* case (*e*); whereas Lord Chancellor *Sugden*, from whom the appeal immediately comes, though agreeing in the conclusion, will not rest it upon the rule in *Wild's* case, but upon the first portion of the will, which lays down the constitution, according to him, of this annuity. The will says, "That whatever I die possessed of, or in any way entitled to, together with whatever property my wife may be any way entitled to, shall produce to my wife an annuity of 100*l.* per annum—to each of my daughters 100*l.* per annum, for themselves and their children—to my wife's mother, in addition to any property she may possess, so as to make up to her during her life an annuity of 100*l.* per annum—said annuities, after the decease of my wife and her mother, to be equally

Lord Sugden, rejecting that which is founded upon the words, "to each of my daughters 100*l.* per annum themselves and their children." Lord Plunket upon the words applies the rule in *Wild's* case. Sir Edward Sugden rejecting that rule in its application to personalty, feeling so strong an inclination to refuse such application that he will not rely upon it, rests his opinion in favour of the perpetuity upon the words, "my will is, at whatever I die possessed of, or any way entitled to, all produce to my wife 100*l.* a-year, and to each of my daughters and their children 100*l.* a-year." My Lords, it makes it the less necessary to enquire which of the two grounds is the safer whereupon to rest this inference, because *quacunque via data* there is the conclusion in favour of a perpetuity adopted by both those learned judges. But I think it right to state, that having much considered this question, and looked into the grounds of Lord Chancellor Sugden's refusal to extend the rule in *Wild's* case to personalty, I have not been able to follow him in that opinion. In his very able judgment—I mean the second part of it—that which he gave upon the 4th of February, after he had more thoroughly considered the matter—he says, (f) "I should have felt a strong disinclination to apply the rule in *Wild's* case, without necessity, to personal estate. In later times, in the case of *Knight v. Vis.*, an example has been set of a similar disinclination." Now when you look to *Knight v. Ellis* (g), you find no such evidence of any disinclination to extend the rule in *Wild's* case. I have read it with very great care; I have spelt every part of the judgment. I will not say that either that which is decided by Lord Thurlow, or the words he uses in giving that decision, are inconsistent with the supposition of his having felt the disinclination ascribed to him, nor will I say that the case does extend the rule in *Wild's* case to personalty; but I cannot find,

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(f) 2 Dru. & War. 106.

(g) 2 Brown's Ch. Cas. 570.

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from first to last, in Lord *Thurlow's* judgment—either in the thing decided or the language used in deciding it—any thing betokening a disinclination to apply the rule in *Wild's* case to personalty. On the contrary, *Wild's* case is never actually referred to in *Knight v. Ellis*; it is not mentioned; nor is any reference made to the rule. The case may be consistent with such a disinclination; but the report in *Brown*, which is fuller perhaps than is usual with that meagre and unsatisfactory reporter, gives no such indication. In the argument at the Bar, undoubtedly, there is a remark thrown out, with reference rather to *Sonday's* case (*h*) than to *Wild's* case, for *Wild's* case is not even mentioned at the Bar; there is something thrown out by the counsel of a difference between real and personal property, but not a word is to be found in the judgment, nor in the several interruptions of the counsel by the Court during the progress of the argument.

It is then said by Lord Chancellor *Sugden* that Lord *Plunket*, had laboured under a misapprehension of *Wild's* case. I must really, in justice to that learned person, state that this is altogether a mistake; for he laboured under no misapprehension whatever. Sir *Edward Sugden* states the mistake to be this, that Lord *Plunket* appeared to have considered the cases to be perfectly analogous, while there is really a great distinction between them. Here, says Sir *Edward*, the gift is to them and

pecting the case then at bar, but respecting a case which is put by the Court.

Now upon looking at that case so put, and to which alone the rule applies, your Lordships will find that Lord *Plunket* is perfectly accurate,—as accurate as it is possible to be,—in his reference to the case. Sir *Edward Sugden* thinks that the resolution respecting unborn issue (which is all we have to do with here) was with respect to a gift to one and his wife, and after their decease to their children. It is no such thing; and I will read to your Lordships what *Wild's* case is. “It was resolved for good law,”—this is the rule in question as regards unborn issue,—“that if A. devise his lands to B. and to his children or issues.” That is exactly the case now at bar; it is not to B. first, and then to the children. It is perfectly true that if you look to the margin, which goes upon the case before the Court, and not upon the second resolution, it says, “devise to A. for life, remainder to B. and the heirs of his body, remainder to W. and his wife, and after their decease to their children.” That was the case then before the Court; but it was not the case upon which the rule respecting unborn issue was laid down. Lord *Plunket*, not confining himself to the margin, which is the work, not of Lord *Coke*, but of his editor, goes to the words of Lord *Coke* himself, and finds it said, “It was resolved for good law, that if A. devise his lands to B.”—not to his children after his decease, but to B.,—“and his children or issues,” then so and so. Therefore it is quite clear that Lord *Plunket* is perfectly right in his statement of the rule in *Wild's* case, and that Sir *Edward Sugden* thought him wrong, probably by looking to the margin, instead of the case. Be the cause of his mistake, however, what it may, it is he that has fallen into an error, and not Lord *Plunket*; nevertheless, it may very well be that the rule is confined to land, because undeniably *Wild's* case is one arising upon real estate. But all I wished to add was, that there

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is no authority, either for saying that Lord *Plunket* mistook *Wild's* case, or that *Knight v. Ellis (g)* betokened a disinclination of Lord *Thurlow* to apply *Wild's* case to personalty.

And, my Lords, it is remarkable, that not only the second resolution in *Wild's* case, but the case cited by Serjeant *Bendloes (h)*, which is quoted by the Court in *Wild's* case almost as an authority for the rule then laid down, is exactly of the same kind with the one now before us, except as regards the nature of the property ; for the Serjeant's case was that of one devising land "to husband and wife, and to the men children of their bodies begotten;" not after their decease, as Sir *E. Sugden* supposed *Wild's* case to be, but precisely as in the present will ; and this fortifies my statement of Lord *Plunket's* having been quite correct in his statement of that old case.

It is remarkable that in those other cases, to which your Lordships may refer, you will find that there is no disinclination expressed to extend the rule ; nay, I should say, that, taking the cases altogether,—and I have carefully gone through them, as it was my duty to do, out of respect for the learned Judge below, and the great importance of the question generally,—I can find no reason to doubt that they seem to have assumed, both at the Bar and upon the Bench, generally speaking,—I will not say in every

on the application of the rule,—that is to say, upon the principle of the rule,—I don't recollect whether or not he mentions the rule, but he argues much in the same way as we do here, upon the absurd and unjust consequences that would follow from not giving the absolute interest in personalty or the estate tail in land.

My Lords, another case, of *Crone v. Odell* (l), appears to have been much considered in the Court below, where a bill was filed to establish the rights of legatees to both real and personal property, and where the Lord Chancellor, in 1811, had the assistance of the learned Lord Chief Justice (*Downes*), who went very fully into the question, and gave a very distinct abstract,—and, I should say, an authoritative abstract,—of the doctrine referring to *Wild's* case; and in the whole of that argument I observe that no distinction whatever is taken between realty and personalty; it is true the attention of the Court was mainly directed to a disputed real succession; but no such distinction whatever was taken.

Then, my Lords, we were told that in the case of *Buffar v. Bradford* (m), Lord *Hardwicke* inclined to deny the application of *Wild's* case to personal estate; and that, I find in one or two text writers, is the prevailing opinion, sanctioning Sir *Edward Sugden's* notion that such a doctrine is to be extracted from that case. When I look to that case itself, however, I really cannot say that I think Lord Chancellor *Hardwicke* has there clearly laid down any such thing. In the 3d paragraph of the 222d page, no doubt, there are words that look like an indication of such opinion being held by his Lordship; but the remarkable part of it is what follows in the next paragraph. “It is the time of possession,” says his Lordship, “in the present case, which takes it out of the reasoning in *Wild's* case; for here Mrs. *Buffar* and her children are to have

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(l) 1 Ball & B. 449; 3 Dow. 61.

(m) 2 Atk. 220.

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four-eighths, and are to take at the same time as joint tenants." Now, if Lord *Hardwicke* had been of opinion that the rule in *Wild's* case did not apply to personalty, he would not have given this reason at all, but he would have said at once, "Why this case has no application here, because I am of opinion that it does not apply to personalty." Instead of which he says, "It is the time of possession in the present case" (a totally different consideration) "which takes it out of the reasoning in *Wild's* case."

My Lords, I ought also to add, that there is a case of *Doe d. Gigg v. Bradley* (*n*), which arose upon leasehold. It was upon the limitation of a term to *S. K.'s* children, share and share alike, and the survivor thereof, (of those children,) "and their children," which are just the words now in question. It was held "that the children took an absolute interest in the term,"—a chattel interest,—share and share alike, subject to survivorship for lives. That does not, therefore, go at all against the application of the rule; on the contrary, it rather favours it; and I find that in one of the arguments at the Bar, *Wild's* case is referred to, though it is not referred to in the judgment given by Lord *Ellenborough*. It is therefore quite clear that *Wild's* case was brought before the Court; and I see nothing whatever in the course of the argument upon the Bench to distinguish it, and to take the case of personalty, or chattel interest, out of the application of the rule; and the decision was in accordance with the rule. There was cited also *Oates v. Jackson* (*o*), which is another case upon the same point.

My Lords, with respect to *Blewitt v. Roberts* (*p*), there were two matters in that case disposed of. It does not at all decide the question of the application of *Wild's* case; but

(*n*) 16 East, 399.
 (*o*) 2 Str. 1172.

(*p*) 10 Sim. 491; 1 Craig & Ph. 274.

there were two matters disposed of. The Vice Chancellor had taken a view of the subject which appeared to the Lord Chancellor, my noble and learned friend near me, to be untenable, namely, that without those words an annuity was a perpetual interest. Now that is a very different thing from applying the rule in *Wild's* case, where the words exist, and the Lord Chancellor (in which I should have entirely agreed) says, "I do not see how this could be a perpetuity;" but then the rest of the decision, though it does not bear immediately and decisively upon the present question, is much more in favour of the application of the rule than against it. It certainly cannot be said that in reversing that decision of the Vice Chancellor his Lordship at all broke in upon the principle, that the rule in *Wild's* case is of a general application.

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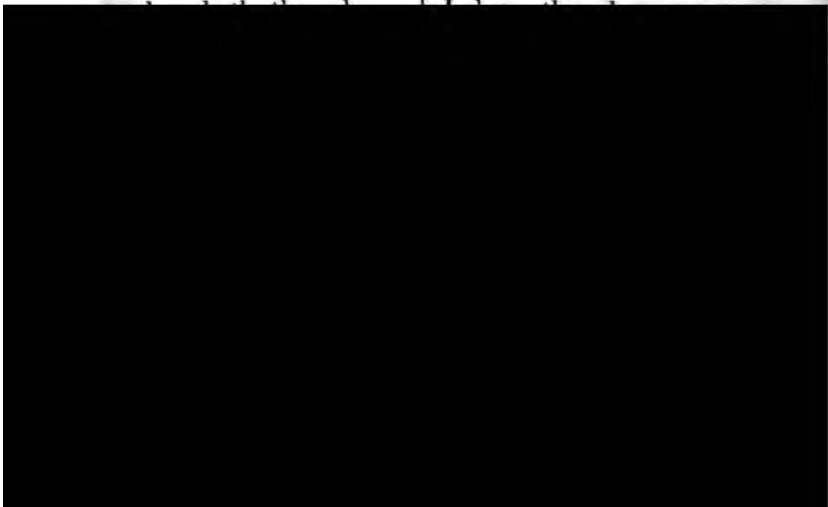
For these reasons, therefore, I certainly agree with Lord Chancellor *Plunket*, that the rule in *Wild's* case of itself, is applicable to personalty; and this is enough to support his decision as to the two daughters. But the terms of the will being sufficient, independent of the rule, to support the conclusion that, had the will stood alone, it would have given a perpetuity, and not a life interest, it becomes unnecessary for your Lordships to decide whether the rule in *Wild's* case applies to the present case or not. I have thought it my duty, from the sincere and unfeigned respect which I feel for that most eminent person Lord *Plunket*, to state that my opinion agrees with his. But I agree also with Sir *Edward Sugden* entirely, that even if the rule in *Wild's* case was out of the question, the words are sufficient in that which forms the constitution of the annuity,—the first words of the will,—to give a perpetuity of themselves.

Then, that being the case, we have made a very material step, and we have by means of that step put our foot upon a ground of great importance in disposing of the whole construction; because our position amounts to this, that

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but for something in the codicil the whole would be clear; and we have the concurrence of both learned Judges—conflicting upon the ultimate conclusion they arrived at after construing the codicils—differing in the route by which they came at this first or intermediate conclusion—we, nevertheless, have them agreeing in the proposition, that the will standing alone gives a perpetuity, and not a life interest.

Then I take leave to make another step. My opinion is, that if you find the will so clear by itself, and the perpetuity so irrefragably established by that will, in order to restrict that perpetuity to a life estate—in order to alter the will—in order to revoke the gift of the perpetuity, the codicil must be found to be clear and unincumbered with doubt, because the will, standing clear and unincumbered with doubt, cannot otherwise be altered—cannot otherwise be revoked. The interest by the will given cannot be cut down to a life interest, unless by clear and undoubted matter in the codicil—“by indication plain,” as was said by the Court in a celebrated case—“by indication plain” of a contrary intention to what prevailed at the time of making the will. There must appear clearly to have been in the mind of the testator, when he made the codicil, an intention opposite to that which he had when he made the will. For I am entitled to deny that the will is doubtful,



We come now, therefore, to the codicil. He had given *William* his annuity and the residue by the will. Then, passing over the first codicil, you come to the second, upon which the decree below mainly rests. "And in case my son *William* shall die without leaving issue male lawfully begotten, my will is, that after the decease of my wife *Mary* and my daughter *Julia Louisa*, my remaining property shall then be equally divided between my sister *Anne Owen* and any daughters by *George Taylor Owen*, her present husband, she may have then living, and my sister-in-law *Charlotte Heron*." In short, he gives it away from his issue to his sisters. At first I thought there was very little in the argument, and that it savoured of refinement, which was raised upon the use of the word "and ;" but upon further consideration I incline to go along with that view. I do not think it necessary for the case; but still I think it aids it. No doubt, having given a perpetuity in the will, if he meant to alter and revoke it, cutting a perpetuity down to a life interest, he would much more naturally, be he a learned or be he an unlearned maker of an instrument, have begun with any other word rather than the word "and ;" for "and" means besides—in addition to—add this—not except this, or nevertheless, but add what is to follow; such is the use of the word in common parlance; it is, "and moreover," "over and above this," or, "besides;" I mean to give something more. It savours much more of an intention to add to than to take away—to enlarge rather than to cut down—to extend rather than to contract what had been given before. If a man had given at first a large estate, and then meant to give a much less one—if, having first given an absolute interest, he afterwards chose to make it an interest for life, he would be much more likely to say, "Whereas I have given so and so by my will, observe, I only now mean to give so much less." I therefore think the ob-

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servation upon the connecting word "and" aids the argument; I think that it was properly made.

But, my Lords, the thing does not rest upon that, because it is not necessary to show—and it is not upon those who maintain the appellant's contention in this case to show—that the codicil meant to add or meant to confirm what was given in the will; for unless the codicil revokes—unless the codicil retracts—unless the codicil alters the will, the will shall stand; that is perfectly clear. Now does it alter or retract? It seems to me the most forced construction that can be put upon it, the one which does the greatest possible violence to the words used, and to the manifest intention which they shew forth, is to hold, as was done below, that this is an alteration or a revocation of the will, and changes the estate first given into a life estate. "After the decease of my wife, if my son *William* shall die without issue male lawfully begotten, and my daughter *Julia Louisa* shall also die, my remaining property shall be equally divided between my nieces." Can any thing be conceived less likely than that a person, having given a perpetuity to provide for his own issue and their descendants, should all at once cut it down to a life interest, upon what event?—the death of one of the takers without issue male. Why was the death of *William*, with issue male or without issue male—above all things with-

thing perfectly unintelligible; and that seems to have struck the Lord Chancellor, for in going over it he refers to it, and says, "then upon a certain contingency" (which he does not name, but it is plainly the one I have mentioned, namely, the son *William* dying without issue male)—"then upon a certain contingency, not perhaps a very wise one." That is an error of the reporter, because of a contingency you cannot predicate wisdom or foolishness; but it means not a very wisely considered contingency. His Lordship, in all probability, said, "upon the view of a certain contingency, not perhaps a very wise view;" and that is quite intelligible. No doubt he might very well say that, because it is very far from being a wise view, that I should give my two daughters a perpetuity, but declare that it shall be cut down to a life interest *in pænam*, not of anything they shall do, but *in pænam* of my son *William*, to whom I also give a perpetuity, dying without issue male. This is really so far from being wise, that it seems to be perfectly unintelligible. Now observe, the whole argument of the Lord Chancellor of Ireland proceeds, and must of necessity proceed, upon the assumption, that "my remaining property" means one thing, and one thing only, namely, all that I have given, except what I have given *William*—all the rest of my estate already given; because nothing else will take it out of *Julia Louisa* and the other. Upon the death of my wife and *Julia Louisa* all my property shall be equally divided, including the residue, subject to their life interest and that which I have given by my will to the two daughters. If you can believe that the words "remaining property" mean "every thing beyond the life interest that I have given in my will"—if you can supply all those words, and say that he means thereby to give that excess to the collaterals, to the nephews and nieces—then you can understand that this revokes the grant in the will. But if you do not believe that, you do not advance a hair's

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breadth towards the conclusion at which the Court below arrived, namely, an alteration and revoking of the gift in the will. Moreover, you must be quite sure that such is the meaning, and that the words "my remaining property" can have none other; because the will is clear, and you cannot revoke or alter it unless the codicil is a clear alteration. Sir *E. Sugden* considers "remaining property" to include, not merely the residue given to *William*, for whose death without issue male he was providing, but all that he had before given in the will to the other children beyond their life interest. How can the words "remaining property" possibly mean any such thing? How can words clearly residuary dispose of particular gifts made, and made before you have any right to talk of a residue at all? Can any thing be more clear than that, having given a residue to *William*, when he is providing for the event of *William's* decease, he disposes of that residue by the not inappropriate words "remaining property?"

My Lords, I ought to have mentioned, before I dismissed the consideration of *Wild's* case, that the rule (which nobody disputes, which Sir *Edward Sugden* expressly acknowledges himself, and which every lawyer must admit)—the rule that words which would give an estate tail in real property, if applied to personalty, give an absolute interest, has always gone upon the assumption that such words as are used in *Wild's* case, and such

But now there is the third codicil. It is needless to go into it further, because I am quite clearly of opinion, that unless the second codicil cuts down the perpetuity to a life estate which is given by the will, there is an end of the question, and the will must stand giving a perpetuity. But the third codicil appears to me materially to support the same conclusion. It appears to me to be quite clear, that the testator meant not to cut down what he had given, but to increase it. Upon the death of *William* without issue male, he gives over—not very rationally I admit—the part become vacant, from the daughters to the collaterals; but to carry that irrational provision one inch further than he carried it, and to add the absurdity of cutting down the perpetuity, which is given by the will, to a life interest on account of those words in the codicil, is, in my humble apprehension, a course utterly impossible for your Lordships to pursue.

My Lords, upon the whole, therefore, I am of opinion—and my high respect for both the learned Judges below is my reason for trespassing so long upon your Lordships' attention in giving that opinion—I am of opinion, upon the grounds which I have stated, that the codicils do not vary, except indeed they may be thought rather to extend, the gift of the will, and consequently that that gift is a perpetuity; that the decree of Lord *Plunket* being right, ought not to have been reversed upon re-hearing; and that, consequently, your Lordships ought to reverse the reversing decree, which will have the effect—and only the effect—of setting up the original decree in the cause.

Lord *Cottenham*.—Both Lord *Plunket* and Sir *Edward Sugden* were of opinion that the annuities are perpetuities. The different annuities, however, stand upon a somewhat different footing. The two annuities given to the daughters have the addition to them which raised the question in *Wild's* case; because the gift to them is to them “and

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their children." The gifts to the wife, and to the mother of the wife, are for life ; but there are two grounds applicable to them all, which seem to me to leave no doubt as to all amounting to a perpetuity. Now those two grounds are, first, that which is relied on by Sir *Edward Sugden* of this being a gift of property producing the amount of the annuity. The expression is, that his property shall produce three several sums. The other ground, which is equally effective for the purpose of showing that these annuities are to be considered in their extent as perpetuities, is that the testator deals with them as being in existence, and operative beyond the period of the lives of those who are first to enjoy them. Take the case of the daughters ; the gift is of an annuity to themselves and their children, there being no children in existence. Now, in what way the law would operate so as to protect as far as possible the interests of the children might become a question ; but it is quite obvious that the testator did not intend the extent of the gift so given to be limited to the lives of the daughters. Again, he gives to his wife an annuity during her life of 100*l.* a year, and to the mother of his wife another annuity of 100*l.* a year ; but were those annuities, those annual payments, to be terminated by the death of the two persons who were thus to take ? So far from it, he says, "The said annuities, after the decease of my wife and her mother, to be equally divided between my three children." Well then, whatever it might be, it cannot be that the duration of the subject matter of the gift was to be measured by the life of the first taker ; because he actually provides who shall enjoy this property after the expiration of those lives. We have, therefore, not only the property directed to produce the annuities, which annuities are clearly to last longer than the lives of those who are first to enjoy them, but we have a disposition of the interest in the subject matter of the gift more extensive than the duration of those lives.

er, both those circumstances occurred in a case which has been referred to, of *Philipps v. Chamberlaine* (q). In this case the Master of the Rolls, Lord *Alvanley*, thus expressed himself—"Upon the residuary clause, it is said, the real import is to give nothing but the dividends and part of the surplus for the respective lives of these four persons; for there are words of severance. I am not prepared to say that I ever heard, that, where a testator gives property in trust and without limitation the dividends and interest are to be paid upon the residue of his personal property, that the dividends should not carry the whole interest. If the words 'for their respective lives' were added, I suppose it would not be contended that the dividends would not carry the principal also, though without the words 'executors,' for there would be nobody who could ever claim the capital; and if I was to rest upon the effect of the clause only, I should apprehend that where the dividends and interest of the residue are given absolutely to the trustee and his heirs, upon trust to pay the dividends and dividends to A. from time to time without limitation of duration, it would carry the whole interest, even without the aid of the subsequent part of this will directing the shares to be paid at the age of twenty years, for the benefit of survivorship in case of the death of them before that age; from which I think a fair inference arises. It is impossible to suppose such an absurdity as would result from the contrary construction. The absurdity may be so great as to raise a necessary inference. A Judge must divest himself of common sense and not attribute such an absurdity to a testator as to suppose that he gives the interest to them for their respective lives and that if any one shall die under the age of twenty years that share given for life only shall survive to the others; and so if more than one die under that age; and if any of them should live to attain twenty-one, in that

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(q) 4 Ves. 51; see p. 58.

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case it should not go over to the survivors, but be undisposed of. That part of the clause is perfectly satisfactory to shew that he did intend to give them the absolute interest. If they were only to have an interest for life, of what consequence would their deaths before the age of twenty-one be? If they had it only for their lives, there would be no part or share for the survivor to have. It would be gone with their deaths. Their living to the age of twenty-one would have no effect. It is clear he meant to give an interest that would survive, even independent of the circumstance that it is given as a residue; and it must always be remembered, that when the residue is given, every presumption is to be made that he did not intend to die intestate. Add to that the concluding part, that if three out of the four shall die during their minority, the survivor is to be entitled 'to the whole residue and surplus aforesaid.' It is said those words must be restrained to the whole surplus dividends; but that is not the usual sense."

Now this is a distinct decision upon a case very similar to the present, so far as there is a gift of the interest of a fund to certain persons, and a direction that after the death of those persons it should go to some other person. In the case before Lord *Alvanley*, it was to go amongst the survivors, and here it is to different individuals; both

Now, in the events which have happened, of the death of *Mary*, and the death of the widow of the testator and her mother, *Julia Louisa* had her own annuity of 100*l.* a year, and she had one-half of the annuity which *Mary* was intended to have—making 150*l.* a year—and she had one-half of the two annuities given to the widow of the testator and to the mother of that widow, so that she had 250*l.* a year in perpetuity; or, in other words, she had property producing 250*l.* a year, and that in perpetuity. That was the provision which the testator very anxiously provided for her by his will. He gives that as a provision which he intended that his daughter *Julia Louisa* should possess. To the son he gives the residue; and he provides by the will, in certain events, that the son shall have also some part of the annuity which he had before given. He was to take one-half of the annuity of *Mary* on *Mary's* death, and he was also to partake of the annuities given to the widow and the widow's mother; but as he was also entitled to the residue, the annuities payable out of the residue would of course in his hands fall into the residue, because he would be entitled to the fund out of which those annuities were to be paid.

Then the testator makes the codicil upon which the decision of Sir *Edward Sugden* is made to turn. He had given the residue, he had given property producing a certain income, in the events which have happened, to his daughter *Julia Louisa*; having provided in the first codicil for the disposition of *Mary's* annuity, she having died; and here I think the word “and” is of extreme importance, because it does necessarily connect the provision which he made on the actual death of *Mary* with the prospective provision which he thinks proper to make on the possible death of the son. Now, reading those two codicils together, which I think is essentially necessary for the purpose of seeing what is the meaning of the testator in the codicil upon which the question turns, we find that he says, “It

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having pleased Almighty Providence to take away my daughter *Mary*, it becomes necessary to alter the disposition of my property after my decease as far as relates to her. I therefore now declare it to be my will, and I hereby direct, that the 100*l.* per annum, &c., provided as within directed for my daughter *Mary*," (and that "*et cætera*" must clearly mean the interest she was to take in the other annuities, in the event of the death of those who are first to enjoy them,) "shall be divided equally between my daughter *Julia Louisa* and my son *William*, and that my will, as within expressed, shall remain in all other respects unaltered." He then clearly, up to that period at least, (for he so states in express terms,) did not mean that any other provision in the will should be altered; but he did mean that upon *Mary's* death, and her annuity therefore being released, it should be divided equally between the two other children, namely, the son, and the daughter *Julia Louisa*. "And in case"—(I now take up the words the testator has used in the next codicil, which was made a considerable period of time after the first, and seeing what he had done in the event of *Mary's* death, it is quite clear he intended to carry on the same provision, and to provide for another event which he thought might happen,)—"And in case my son *William* shall die without leaving issue male lawfully begotten, my will is, that

codicil, if *William* should die without issue male he would not become the object of his annuity. Then he has to dispose of the part of his property which in that event, and according to the intention he then entertained, would remain to be disposed of. Why then he uses a word, though not identical, of the same meaning. The event in which this disposition was to take place was the death of *William*. The death of *William* would obviously make it necessary to dispose of that which he had provided for *William*, because the death of *William* had nothing to do with that which he had given to his daughter *Julia Louisa*. But then is there any ambiguity in the expression? The event he expressly refers to is the death of *William* as the release of the property given to *William*. What is the property given to *William*? Why, in the will it is the residue of his property, and in the codicil it is "remaining property." What is the meaning of "remaining property?" That which the testator has not before disposed of. That is the technical meaning. Nobody speaks of a residue in a will in any other sense, than as that which he has not specifically given. What he has before disposed of forms no part of the residue. Now, can a gift of a money legacy in a will be revoked or altered by a subsequent gift of the residue? and if it cannot be revoked in a will by a subsequent gift of the residue, how can it be revoked by a codicil, all which constitute one testamentary disposition, and are to be considered with reference one to the other? With all the deference I feel for the opinion of a very learned and very distinguished Judge, I cannot entertain a doubt upon the construction. I consider it perfectly plain that he was alluding only to that portion of his property which on the death of *William* would, according to his view of the interests of his children, be to be disposed of, and that he is disposing of that, and of nothing else; that he is disposing of that which is residue, which residue he had given to *William*,

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and which residue in the event of *William's* death he intended to dispose of in a different manner.

If there was more ambiguity in this codicil, no doubt it might require more consideration ; but in the view I take of it, it is perfectly plain what the testator meant. We have the description of the property and the event all corresponding ; and the question is, whether he meant by this codicil to revoke what he had given to *Julia Louisa*, and to cut down that, which before by all the authorities was to be a perpetuity, to a life estate ; or whether he merely meant to dispose of that which he had before given to *William*. I consider, according to the natural and obvious construction of this codicil, he meant only to dispose of that which he had before given to *William*, and that the annuities to *Julia Louisa* remain just as they were on the face of the will.

Lord Campbell.—My Lords, I am likewise of opinion that the decree of Lord Chancellor *Sugden* ought to be reversed. I consider that the will gives perpetual annuities to the testator's children, and that they are not afterwards cut down to a life interest by any codicil.

Both the Lord Chancellors whose decrees are under consideration agree, although on different grounds, that under the will perpetual annuities are taken by the children. It is not now necessary to give any opinion upon the question whether the rule in *Wild's* case applies to a bequest of personalty ; and I content myself with observing, that I do not consider myself bound by Lord Chancellor *Sugden's* doctrine on this subject. The rule in *Wild's* case (to be distinguished from the *decision*, for in truth the question did not there arise,) seems to proceed on this principle :—that if there be a devise to the parent and unborn children, as they can neither take as joint tenants or in remainder, the law will do all it can for their benefit, by construing this an estate tail in the parent ; ⁵⁰

that if the estate tail be not barred, the children may successively take. I am not clear that this principle may not be applied to a bequest of personalty; for it would certainly be a benefit to the children, to hold that the parent takes an absolute interest instead of a mere life interest, although there is no certainty that the children will take any part of the property on the death of the parent, and if they do it is by the Statute of Distributions, and not by the form of the gift. You would do great violence to the expressed will of the testator by entirely striking out from the will the words in favour of the children; and it is possible you may best effectuate his intentions by holding that the parent takes a *quasi* estate tail in the personalty, which would give him the absolute disposal of it, and which may lead to its being distributed among the children at his death.

But on the ground taken by Lord Chancellor *Sugden*, at this will dedicates the *corpus* of a fund to the purchase of annuities, the annuities in question must be considered as granted in perpetuity, and not merely for the use of the first takers.

Agreeing, then, with both Lord Chancellors as to the effect of the will, taken by itself, I have only to see whether the perpetual annuities thereby granted are cut down to a life interest by any of the codicils.

It is admitted that the first codicil has no such operation, as it merely provides for an equal division between the testator's son and daughter *Julia*, of the interest which would have been taken under the will by his deceased daughter *Mary*.

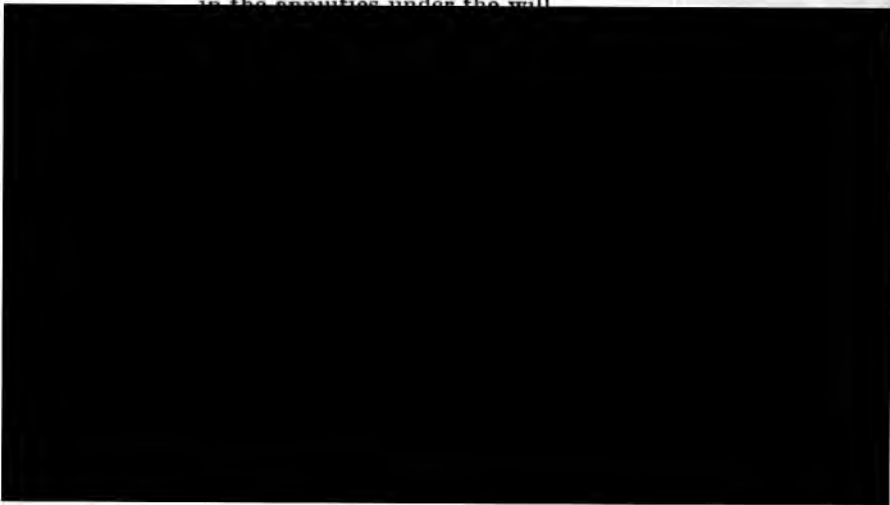
But it is the second codicil which is relied upon by the objectors. If that codicil disposed of the property which the will gives to the daughters, I think a powerful argument might be deduced from it, as it directs that if his testator should die without leaving issue male, on the death of his wife and his daughter *Julia*, his "remaining pro-

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perty" shall be divided among certain collateral relations; but the foundation of this argument is, that in the "remaining property" is included the property given by the will to the daughters. This is not the natural construction of the codicil, and I have heard no reason assigned to prove that it is the true construction. The words "after the decease of my wife *Mary* and my daughter *Julia*" only indicate the time at which the gift to the collateral relations was to take effect, and not what was meant to be given to them. I conceive that the second codicil only deals with the residue left to the son by the will, and that by "remaining property" in the codicil the testator means exactly the same thing as by the "residue of his property" in the will. If the codicil does not deal with the annuities granted to the children, of course it can have no effect in cutting down these annuities from a perpetuity to a life interest.

I must say that the construction contended for by the respondents unnecessarily imputes to the testator the gross injustice and absurdity of depriving the children of his daughter of the provision he had made for them, and leaving the whole of his property to collateral relations, upon the contingency of his son dying without issue male; I therefore clearly think that there is nothing in the second codicil to affect the interest which *Julia* took in the annuities under the will



cable to them all ; and the division directed between the three children is more suitable to the *corpus* of the fund from which annuities were to be paid than to life annuities.

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I would observe that I should rather deprecate the application of any technical rule to the construction of a will of personalty. By this course of proceeding the law of Scotland has got into such a preposterous state, that we were yesterday obliged to hold that a disposition of a sum of money, which was expressly to the parent for life, remainder to unborn children in fee, gave the fee to the parent. Here it is a pure question of intention, to be gathered from the language of the will. It is admitted that the intention of the testator was to give perpetual annuities ; and I see nothing to prevent that intention from being carried into effect.

Upon the points brought by appeal before us in this case, I therefore think that the decree of Lord Chancellor *Sugden* should be reversed, and that of Lord Chancellor *Plunket* affirmed.

Mr. *Bethell*.—Will your Lordships allow me to ask how far your Lordships' order will extend ?

Lord *Brougham*.—We only mean to reverse that portion of the decree appealed from, which reverses the original decree of Lord *Plunket*. If anything has been done below which is consequential on reversing Lord *Plunket's* decree, that which is done consequentially must be undone also : so that you had better ascertain, within a reasonable time, what has actually been done in Ireland, and then give us the form of a decree, showing it to the other side, in order that there may be no doubt. Otherwise applications will be made in Ireland as if something stood which does not stand, and as if something was reversed which is not reversed. We cannot exhaust the subject without seeing what has been actually done.

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Mr. *Bethell*.—Do your Lordships think this is a proper case to direct the costs of the appeal to come out of the estate? The Lord Chancellor below gave the costs of the re-hearing.

Lord *Brougham*.—Upon the principle of the doubt having arisen from the form of the instrument (which is the proper principle, no doubt), I think we may consider that when you come with your frame of the decree. Were the costs given of the re-hearing?

Mr. *Bethell*.—Yes, my Lord.

Lord *Brougham*.—The question is, whether this House, as is usual in cases of appeal, should not put itself in the position of the Court below, and give the same judgment which ought to have been given upon the re-hearing.

Lord *Cottenham*.—If Sir *Edward Sugden* had taken the same view of the case which we have taken, instead of directing the costs to be paid out of the estate he probably would have refused the re-hearing, with costs. Therefore the judgment of this House, as it stands, reversing Sir *Edward Sugden's* decree, protects the parties, out of whose property the costs were directed to be paid, from that part of the decree as well as the rest. But then comes the question which Mr. *Bethell* raises, whether the circumstances are such as to make it right that the costs of this proceeding should come out of the estate. I am

scure will; therefore it is very proper, I think, that all the costs should be paid out of the estate.

Lord *Cottenham*.—The result will be, that the decree on the re-hearing is reversed altogether, with costs; and that the costs of the proceedings before this House will be paid out of the estate.

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(The order subsequently made by the House, after reciting the decrees of the 2d Feb., 1841, and the 4th of Feb., 1842, proceeded thus:—It is hereby ordered, declared, and adjudged, that the several annuities of 150*l.* and 100*l.*, making together 250*l.*, be deemed perpetual annuities; and that the appellant *John Stokes*, is entitled during his life to receive and be paid the amount of the said annuities, and that the appellant *Louisa Stokes*, the minor, is entitled thereto, in perpetuity, after the decease of the said *John Stokes*; and it is further declared, that the said annuity of 250*l.* is well charged on all the chattels real, and other the personal estate of the said testator *William Heron*, the elder, deceased. And after the payment of the costs decreed to be paid, and setting apart a fund for payment of the costs of this appeal as hereinafter adjudged, it is ordered that a sufficient portion of the said personal estate be allocated and set apart by the master as a fund for the payment of the said annuities, and also for payment of arrears of the same. And it is further ordered, that the costs of this appeal be paid out of the funds in Court to the credit of this cause, said costs to be certified, &c. And it is further ordered, that all such other parts of the said decree of the 4th February, 1842, as are inconsistent with or at variance with the decree and directions hereby made and given, be, and the same are hereby reversed. And it is further ordered, that the cause be remitted back to the Court of Chancery in Ireland, to proceed and do therein as shall be just and consistent with these declarations, directions, and orders.)

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 April 25.

FRANCES CLEMENTINA RENNIE, with consent of RICHARD RENNIE, her husband, the said R. RENNIE for his interest, and their children by their said father - } *Appellants.*

JAMES RITCHIE - - - *Respondent.*

*Wife's
 separate estate.
 Alimentary
 debt.
 Assignment.*

A testator in *Scotland* gave all his property to trustees; first, to pay his debts; secondly, to pay Mrs. R. (a married woman), so much of the annual proceeds as they might deem necessary for the support of her and family during her life, declaring the same to be alimentary and exclusive of her husband, and not to be attachable, nor assignable, nor subject to any deeds or debts of her or her husband. The acting trustee, with consent of Mrs. R., assigned to her alimentary creditor the rents of the trust property; first, to pay debts affecting it; secondly, to pay part of the rents to Mrs. R. for aliment; thirdly, to apply the residue in payment of the debts due to the assignee:—

Held that the assignment was void on three grounds—viz.

- 1st, It was not competent to the trustee to substitute another person for himself in the trust—which was the effect of the assignment.
- 2d, The rule of law in *Scotland* requiring the concurrence of the husband in his wife's deed, could not be dispensed with by his absence abroad at the time for a temporary purpose only.
- 3d, The assignment was void, as it violated the express prohibition against alienation: And in this respect the law in *Scotland* is the same as in *England*.

—◆—

THIS was an appeal against several interlocutors, hereinafter stated, pronounced by the Lords Ordinary and the Court of Session in *Scotland*, in conjoined actions, which related to the validity of a deed of assignation held by the respondent as a security for advances of money, and to the amount and nature of the advances.

William Elphinstone Robertson, being owner of a valuable heritable tenement in *Princes Street, Edinburgh*—except a part of the under-flat thereof, which belonged to his sister Mrs. *Rennie*, the appellant, in her own right, exclusive of her husband—executed a trust-disposition and settlement on the 17th of January, 1831, *mortis causa*,

whereby he conveyed his said tenement and his whole estate, heritable and moveable, to Captain *Robert Barclay* and others, upon trust; *first*, to pay his debts and funeral expences and the expences of the trust, and that by a gradual liquidation, or otherwise, as the trustees might deem proper. The deed then proceeded thus :—

“*Secondly*, That my said trustees shall, in the event of the said *Frances Clementina Robertson or Rennie*, my sister, surviving me, provide and pay to her the free annual profits or proceeds of the said subjects and effects hereby conveyed, or such part thereof as they may deem necessary for the support of her and her family: and that at two terms in the year, by equal portions, beginning the first term’s payment thereof at the first term of *Martinmas* or *Whitsunday* that shall happen after my death, and so on half-yearly during the lifetime of my said sister; *declaring that the foresaid provision to my sister is purely alimentary, and exclusive of the jus mariti of her present or any future husband, and that it shall not be attachable by arrestment or diligence of any kind whatever, nor assignable nor subject to any deeds which either she or her present or any future husband may grant in relation thereto, or debts which they may contract.* *Third*, That in the event of my said sister predeceasing me, or in case of her surviving me, from and after her death, my said trustees shall hold the said subjects for behoof of her children procreated, or who may be procreated, of her present or any subsequent marriage, and shall divide the same equally among them, and the survivors of them, share and share alike; the shares of the sons to be payable on their attaining majority, and those of the daughters on their being married or attaining majority: but declaring always, that the said provisions to the said children shall not become vested interests in them until after payment or conveyance thereof by my said trustees in their favour respectively, unless any of them shall die before payment or conveyance, leaving issue, in which event the provision to him or her so dying shall devolve upon and be conveyed or paid to his or her surviving issue, share and share alike; and if any of the said children shall die without issue, and before conveyance or payment of his or her provisions, the same shall belong to and be equally divided among the survivors; and I appoint my said trustees, after the death of my said sister, to pay and apply the annual profits and proceeds of the estate, or so much thereof as they may think necessary, towards the maintenance, clothing, and education of her said children, and that without the advice or interference of the said *Richard Rennie* in any respect. And my said trustees shall also have the power to make such advances to the children of my said sister, from the capital of their shares, as they may deem expedient for establishing them, or any of them, in business.”

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The deed empowered the trustees to sell and dispose all or part of the trust property, to add and assume new trustees, and to appoint factors; and declared that the trustees should not be liable for omissions nor neglect of management, but each for his own actual intromissions only.

Robertson had contracted a debt of 1500*l.*, and gave bond, burdening the said tenement with the payment thereof, with interest.

In June, 1832, Mrs. *Rennie*, in consideration of various sums advanced from time to time to her and her husband (amounting together to a sum of 400*l.*), by Mr. *Ritchie* the respondent, a stationer in *Edinburgh*, executed to him with consent of her husband, certain deeds for securing the repayment of this said sum, with interest, out of her original part of the said tenement in *Princes street*.

Robertson died in *India* in *November*, 1832, and in 1833, when his death became known in *Scotland*, Captain *Barclay* alone accepted the trusts of his settlement, and immediately entered upon the administration of them. Mr. and Mrs. *Rennie*, being still in difficulties, were allowed to take up the rents of the whole of the said tenement, and at their pressing request, *Ritchie*, with the sanction of Captain *Barclay*, advanced money for their sustenance, for the payment of taxes and repairs of the tenement, and of interest on the debt of 1500*l.* In 1834, Mr. *Rennie* was so pressed by his creditors that he was obliged to leave *Scotland*. He then went to *Canada* with the intention of removing his family there, if he succeeded in his prospects. The money for this journey was supplied by *Ritchie*. Mrs. *Rennie*, with her children, being left thus destitute, pressed *Ritchie* for further advances of money, which he consented to make with the sanction of Captain *Barclay*, and on the faith of repayment out of the trust property.

Under these circumstances a deed of assignation, the validity of which is the subject matter of the appeal, was

executed by Captain *Barclay*, as trustee as aforesaid, in favour of *Ritchie* in September, 1835, which, after reciting *Robertson's* trust-disposition, and the said deeds executed by Mrs. *Rennie*, further recited, as follows :—

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“That in the execution of the said trust, I, in the year 1832, with the concurrence and approbation of the said Mrs. *F. C. Rennie*, took the assistance of the said Mr. *James Ritchie*, who, at her request, and with my sanction, not only made necessary advances from time to time to her, for the maintenance and support of her family, but also paid various claims attaching to the said property in *Princes St., Edinburgh*, and made sundry payments to account of interest of the said heritable debt of 1500*l.* sterling, affecting the same; by all which the said *J. Ritchie* is now in advance for me, as trustee aforesaid, the sum of 474*l.* 17*s.* 8*d.*, including interest on the said sum of 400*l.*, &c., as also considering that, in order to put the said trust property in *Princes St.* into a state for being let more productively, it was lately found necessary to make extensive repairs and alterations thereon, by which considerable expence was incurred to tradesmen and others, whose accounts amounting to 355*l.* 11*s.* 9*d.* conform to list, &c., are still unpaid, and now seeing that until the said sums of 474*l.* 17*s.* 8*d.* and 355*l.* 11*s.* 9*d.* are liquidated and paid from the said subjects, the said Mrs. *F. C. Rennie*, has agreed to accept, by way of aliment therefrom for her self and her family, of such sum or sums as I or my successors in office may, with reference to the terms of the said trust deed, consider ourselves warranted in the circumstances to allow and pay for the above purpose, but not exceeding the sum of 60*l.* sterling *per annum*; and that on condition of my granting these presents in manner underwritten, the said *J. Ritchie* is willing not only to abstain from using any legal proceedings against me on the said trust estate for recovery of the said debt of 474*l.* 17*s.* 8*d.* due to him, but also to satisfy and pay the claims of the said tradesmen and others upon the said property, amounting to the said sum of 355*l.* 11*s.* 9*d.*, so as to prevent accumulation of expence by any legal proceedings at their instance, and farther to pay the interest of the said debt of 1500*l.* sterling as the same shall fall due.”

Upon these recitals, and for the reasons therein set forth, Captain *Barclay*, as trustee, with the consent of Mrs. *F. C. Rennie*, constituted and appointed the said *J. Ritchie*, his heirs, &c., his (*Barclay's*) lawful assignees of the several rents or tack duties of the said trust property in *Princes Street*, (which amounted together to the annual

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sum of 310*l.*) together with the several tacks or leases, so long as this assignation should remain in force, with full power to pursue for the said rents or tack duties, and to grant receipts, &c., from the date of these presents until the purposes thereafter specified should be fulfilled. The purposes were these :—

“ *First*.—For payment of the interest of the said debt of 1500*l.* affecting the said trust subjects, with the expence of insuring the same against fire, and of paying the public and parochial burdens exigible therefrom ; as also the interest of the said sum of 400*l.*, due to the said *J. Ritchie* himself. *Secondly*, for payment to the said Mrs. *F. C. Rennie*, for aliment to herself and her family, of such sum or sums as I or my foresaids may consider ourselves warranted as aforesaid, to allow and pay to her for the above purpose, but not exceeding the sum of 60*l.* sterling *per annum*. *Thirdly*, for payment to the said *J. Ritchie* of such remuneration for his trouble in the premises as may be fixed and determined by (two persons named) ; and, *Lastly*, for applying the balance of the said yearly rents or tax duties towards the gradual liquidation and payment of the said sums of 474*l.* 17*s.* 8*d.* and 355*l.* 11*s.* 9*d.* until the same, with interest thereon, at the rate of 4 *per centum per annum*, shall be fully paid and extinguished ; when the said *J. Ritchie* shall be bound and obliged to repon and retrocess me or my successors in the said trust in and to the foresaid tack duties and rents above assigned ; it being always in the power of the said *J. Ritchie*, in the event of the rents of the said property falling off so as to be inadequate to the purposes of these presents, to renounce this security on giving me, or the trustee acting for the time, six months premonition in writing, and to use all legal measures for payment of the sums that may then be due to him, in the same manner as if these presents had not been granted. Providing always, that the said *J. Ritchie*, by acceptance hereof, shall be bound

Ritchie, who has advanced, at our request, and in our behalf, the sums as stated in the said account, and we find the same correctly stated, and that at the date hereof, after deducting sums received as on the credit side, of 110*l.* 10*s.* sterling, the said *J. Ritchie* is in advance for the trust estate, and is a just and lawful creditor thereupon to the extent of 474*l.* 17*s.* 8*d.* sterling, exclusive of periodical interest, on which sum and interest upon the respective advances made by the said *J. Ritchie*, from the period of advance until repayment, the said *J. Ritchie* is hereby authorised to take credit in a new account between him and us and the said trust estate; and I, the said *F. C. Rennie*, hereby ratify and approve of the whole actings and intrusions of the said Captain *R. H. Barclay*, as trustee foresaid, at and prior to the date hereof; and I declare that every act and deed of the said Captain *Barclay*, in regard to the management under my said father's settlement, and the advances made by the said *J. Ritchie* foresaid, have had my free and unbiased concurrence and approbation."

Ritchie received the rents of the trust property from the date of this assignment until Captain *Barclay's* death in 1837, whereupon Mrs. and Mr. *Rennie* (who had returned from *Canada* in 1836, disappointed in his hopes there) applied to the Court of Session, and by an order of that Court Mr. *James Crawford* was appointed *curator bonis* to the trust estate.

Ritchie, having been removed from the trust property, brought an action against the appellants and the *curator bonis*, concluding for a declaration that the said assignment was valid, or otherwise that he was a just and lawful creditor on the trust estate, for the sums mentioned in the deed and not discharged, or, at all events, for the sums laid out on the repairs of the trust property, or advanced for sustenance to Mrs. *Rennie*.

The appellants brought an action at the same time against *Ritchie* and the representatives of Captain *Barclay* for reduction of the said deed, and for a declaration that the same and the said docketed account were void, and that *Ritchie* should account for his intrusions with the trust estate.

The pleas in law subjoined to the respondent's re-

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vised condescendence in his action, and to his answer to the counter action, were to the effect that :—

1. The assignation held by him was a valid and effectual deed, and he was entitled to have its validity declared, and the deed enforced: 2. Even if any part of the debts, for which the assignation was granted, could not be legally covered by the security, the assignation was still valid, and ought to be sustained, *quoad ultra*: 3. Whether the assignation was valid or not, he was a just and lawful creditor of the trust estate of *Robertson*, on account of all the debts due by that estate, paid by the respondent, and all the advances made by him on its behalf, and his right as creditor ought to be declared and enforced: 4. In so far as advances were made by him to Mrs. *Rennie*, or at her desire to her husband, or other members of her family, for their support, he was, at all events, for such advances, an *alimentary* creditor of Mrs. *Rennie*, and entitled to affect the produce of the trust estate falling to her, after deduction at least of a suitable allowance for current aliment: 5. There was no ground stated or existing in which the said assignation and docquetted account could be rightly brought under reduction: 6. The action of reduction was unnecessary and incompetent, the same grounds being sufficiently brought into discussion in the respondent's action of declarator of validity: And 7. That the respondent was not bound to enter into any accounting with the

rust and its terms, could take no benefit under the same :
 2. The deed could not be sustained as even partially valid, in so far as the claims in security of which it was granted might be held good against the trust property, in respect that it intrinsically imported an incompetent devolution of the trust itself, not merely by transferring the whole management and control of the trust estate to a stranger, but by excluding the trustee from the performance of the duties towards the beneficiaries, which he was *bound* and alone entitled to exercise : 3. The respondent's claims on account of advances in payment of interest of heritable debts and public burdens could be sustained in so far only as these were properly vouched : 4. He had no effectual claim against the trust estate for such part of his advances as were alleged to have been made to Mr. *Rennie*, whose *jus mariti*, as applicable to the proceeds of the trust estate, was expressly excluded by the deed : 5. He was not entitled to recover the expence of alleged improvements or repairs made without any proper authority : 6. His claims, as affecting the trust property, must be limited to the amount of his advances for the aliment of Mrs. *Rennie*, as the same may be properly instructed : 7. The docquet subscribed by Mrs. *Rennie* ought also to be reduced (as well as the deed) as having been granted without due information or protection, to the prejudice of herself, a married woman, and her children, at least in so far as it afforded any support to the assignation : 8. The respondent was bound to account for and pay over the trust rents and other funds, which he had uplifted under the assignation to the *curator bonis*, to be applied by him agreeably to the provisions of the trust deed : And 9. That the respondent having wrongously intronitted with the trust funds, was not entitled to withhold the same, even in satisfaction of such parts of his claims as might be held to be available against the trust estate, but bound to

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account to the full extent of his intromissions in the mean time, under reservation of his right to make effectual such parts of his claims in a regular and competent manner against the *curator bonis* and the trust estate.

Pleas were annexed to the answer of the *curator bonis* to the respondent's action, corresponding in effect with the above first and second pleas for the appellants. To their action the *curator* declined to be a party.

The records in both cases having been closed, the Lord Ordinary (Lord *Moncrieff*), on the motion of the respondent—before answer, and without prejudice to the case standing in the debate roll—remitted the process of declarator to an accountant to examine the respondent's accounts, and to report thereon, and specify; 1. the sums claimed by the respondent as due to him in respect of the debts due of *Robertson* (the truster), and for which the trust estate was liable; 2. the sums claimed by the respondent, as paid by him, for parochial and other like burdens affecting the trust estate; 3. the sums claimed by him for alimentary advances to Mrs. *Rennie* and her family; 4. the sums claimed by him for expences of management, and commission, with interest on these several heads of account respectively; 5. to take an account of the rents of Mrs. *Rennie's* separate share of the said property, and the interest of the debt of 400*l.*, and other burdens affecting her property; 6. an account of any sums advanced by the respondent to or on behalf of Mrs. *Rennie*; and 7, 8, and 9, to take accounts of payments for feu-duty, repairs of the trust property, and interest on all sums; all questions as to the ultimate liability of the trust estate, or of any of the parties for these advances, were reserved.

To the report made by the accountant on the above matters, a note of objections was lodged for Mrs. *Rennie*, and the case coming again before the Lord Ordinary (*Moncrieff*), he pronounced an interlocutor on the 20th

May, 1840, whereby he conjoined the two processes, and “Finds (a) (among other findings,) that all the grounds for reducing the deed of assignation and the docquet, depending on allegations of fraud, are abandoned; and that the remaining grounds of reduction are necessarily involved in the grounds of the declarator and the state of accounting, under its second or alternative conclusion: Finds, that the question concerning the competency and validity of that deed by the trustee and Mrs. *Rennie*, so far as it might be necessary to determine the question, was materially different in regard to the interests of the children of Mrs. *Rennie*, as the parties ultimately entitled to the fee of the property, and in regard to the interest of Mrs. *Rennie* herself, as in the right of an alimentary provision of a defined character, exclusive of the husband’s *jus mariti*, and that any question concerning the validity of the docquet was also different from that relating to the deed of assignation: Finds specially that there was no relevant ground alleged for reducing the docquet, so far as it was a probative instrument under the hand of the trustee, and imported deliberate acknowledgment of the correctness of the accounts referred to, and his sanction to the various articles expressed in them, so far as the same might depend on his succession or homologation, without prejudice to the legal effects of the said docquet in other respects, and subject always to the correction of any errors: Finds that the deed of assignation was not legally valid or effectual, in so far as any interests vested in the children of Mrs. *Rennie*, as ultimate fiars of the property, might be affected in any manner in which they could not have been affected if the deed had not been executed: Repels

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(a) There being no report of this case in the Court of Session, it appears necessary to set forth here the material passages in the interlocutor, and also some of the Lord Ordinary’s reasons for his judgment, contained in a note annexed to the interlocutor in the printed cases of the parties. (*Vide post*, 215, note.)

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the objections to the accountant's report generally, and approves thereof, as correctly ascertaining the state of the accounts between the parties, subject to certain reservations there expressed: Finds it sufficiently instructed by the report and the documents in process, that the various sums set forth in the account current of the intromissions of *Ritchie*, comprehended under the 1st, 2d, 3d, 7th, and 8th articles (*b*) in the accountant's abstract of the accounts, were all just and true debts, either against the trust estate, in so far as they consisted of debts of the truster, or constituted legal burdens on the estate, or otherwise, where they have not that character, against the liferent interest of Mrs. *Rennie*, either as legal deductions from the annual produce, or as debts contracted for the aliment of her and her family; reserves consideration of the 4th, 5th, and 9th articles: Finds that it appeared from the conclusion of the accountant's report, that, supposing the objections taken by the defenders on the 3d and 8th branches of the abstract to be repelled, and that this interlocutor repelling them should become final, and supposing the other articles reserved to be adjusted so as to give *Ritchie* credit for them, his debt stood reduced, in June, 1838, to 364*l.* 2*s.* 5*d.*, while there was in the Royal Bank 266*l.* 10*s.* 4*d.*, and the free rental of the trust property was 249*l.* 5*s.* 2*d.*; that, in these circumstances, if *Ritchie's* claims of debt were just as against Mrs. *Rennie* and the rents of the trust

the conjoined processes, Finds that the deed of assignation, and the docquet relative to it, so far as they import a qualified and temporary assignation by Mrs. *Rennie* of her liferent right in the future rents of the property, for security and payment of debts contracted by her for the aliment of herself and her family, which were found on investigation to be just and true debts, were not, in the circumstances in which they were executed by her and the trustee, liable to reduction at the instance of her or her husband, and that so far as they were executed for security and payment of advances, on account of debts which constituted preferable claims against the trust estate, or the rents thereof, she had no title or interest to insist on reduction of them (c)."

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(c) To this interlocutor the Lord Ordinary added a note, from which the following are extracts:—

"The general character of this case is too clear to admit of doubt. Mr. *Ritchie* has had the misfortune, with no selfish motive even alleged against him, to involve himself in the affairs of Mr. *Rennie* and his family, and through a series of years to make continual advances to them, out of mere friendship, and for their bare subsistence. Mr. *Rennie* had no means of his own, and no employment during all the time, and there is nothing more certain than that the advances made by Mr. *Ritchie* were all made on the earnest solicitation of Mrs. *Rennie*, for the preservation of herself and her family, and that the particular deed which is brought under challenge, was substantially no more than what not only she, but Mr. *Rennie* also, had, in the most express terms, pledged themselves to grant, while drawing, with the most pressing urgency on the friendship and resources of Mr. *Ritchie*. It was truly observed in the debate, that ingratitude is not a legal defence of deeds which may be ineffectual in law, &c. The Lord Ordinary, from the complexity of the transactions, and the peculiar nature of the deed objected to, has found no small difficulty in extricating the cause in a manner satisfactory to himself, according to the justice of the case, and with safety to the law. He is relieved from entering into much detail, by the very clear statement in the accountant's report, &c. He must own, however, that it was a surprise to him, not having then read the report, that at the end of the debate it came out, that if Mr. *Ritchie's* accounts are really correct, and his claims constitute just debts against Mrs. *Rennie* (of which he has no doubt), there is truly no remaining

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Against this interlocutor a reclaiming note was presented by the appellants. The Lords of the second division having considered the same, pronounced an interlocutor the 8th

subject of controversy concerning the assignation, because the debt is either fully paid, or there must be funds in the bank for paying it, and Mr. *Ritchie* can have no objection when that is done to discharge the assignation, and put the *curator bonis* in possession of the rents."

"There are, however, a few points on which the Lord Ordinary thinks it necessary to add some observations:—

"1. He has not the least doubt that all the articles objected to under the 3d article of the accountant's abstract are correct charges for advances for aliment to Mrs. *Rennie* and her family. The material objection is, that in a number of instances the money was given to Mr. *Rennie* himself, while living in family with his wife, and having no other means of subsistence. The accountant has demonstrated that, in the most material article, making one-half of the sums objected to, if not a great deal more, the payment was made at the express request of Mrs. *Rennie* and Captain *Barclay*. And, both for the reasons stated by the accountant, and because it appears to the Lord Ordinary that the particular mode of making the payment is of little consequence, when it clearly appears that the money was given for the support of the family, he cannot think that the objection to any of these *bona fide* payments could, with any justice, be sustained. The defenders object strenuously to the sums of 50*l.* and 20*l.*, which were given to Mr. *Rennie* when he went to *America*. When one reads the correspondence relative to this matter, it must be thought a very hard objection. *Rennie* was bankrupt, and fled from *Scotland*, and writes, that if he returned, he must expect to go to prison, and then both he and Mrs. *Rennie* beseech the pursuer, in the most piteous terms, to make these advances to him that he might go to *Canada*, promising a deed of the

of December, 1840; adhered to the Lord Ordinary's interlocutor, and reserving all claims of expences, remitted the process to Lord *Ivory* in place of Lord *Moncrieff*.

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rations of the property. Here again the chief objection is, that the repairs were not all executed under the express orders of Captain *Barclay*. It is not denied that they were executed, nor is it said that they were not necessary or useful, &c. But there is a short answer to these objections; all these articles are comprehended in the account which was docketed by Captain *Barclay*, and embraced by the assignation, and whether that deed, as an assignation, was within Captain *Barclay's* power or not, his probative acknowledgments of the expense of these repairs and meliorations are liable to no challenge whatever, when the allegations of fraud are withdrawn. He was a man completely *sui juris*, and after he, with the concurrence of Mrs. *Rennie* herself, has deliberately recognized and sanctioned these debts, contracted for repairs of the trust property, it is surely out of all question to say that they are not trust debts, merely because they may have been made through the instrumentality of Mr. *Rennie*.

"3. It was agreed that the matter of expenses, &c., forming the 4th article of the abstract, should stand over. And with regard to the 5th article, relating to the interests of the 400*l.*, the Lord Ordinary might have given judgment upon it to some effect. But as there is an uncertainty concerning the just proportion of the rent corresponding to Mrs. *Rennie's* separate property, and the right to apply the trust rents to the other interest, may admit of discussion, he has thought it better to reserve the whole point. The 9th article, of progressive interest, must of course stand over.

"4. There can be no doubt that Captain *Barclay* had no power to assign even the rents, in any manner to the prejudice of the children entitled to succeed to them in the event of Mrs. *Rennie's* death; and the Lord Ordinary has so found, with reference to the conclusion in the declarator, though the *curator bonis* does not insist in the reduction. At the same time, it does not appear that the children have really any interest now which can be at all affected.

"5. The grounds of reduction which remain, are simply, that Mrs. *Rennie* was a married woman, that her husband did not concur in the assignation, and that the alimentary provision is declared not to be assignable by the trust-deed. The question is, whether Mrs. *Rennie* and her husband are entitled to reduce the deed on these grounds, with reference to the circumstances under which it was granted. The Lord Ordinary thinks that they are not. In so finding he does not mean to decide any abstract question, but only finds that these parties are not entitled to reduce in the circumstances of this case.

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Another interlocutor, pronounced the 25th November, 1841, by the Lord Ordinary (Lord Ivory), upon the matters reserved in the first—viz. the 4th, 5th, and 9th

“ In the first place, it is settled by the case of *Monypenny v. Lord Buchan*, (July 11th, 1835) that, notwithstanding the strongest clauses of this nature, excluding arrestment and assignation, an alimentary provision may be assigned for alimentary debts. Laying the trustee aside, therefore, Mrs. Rennie could effectually assign her alimentary right for security and satisfaction of alimentary debts previously contracted; more especially, considering the extent of it; and that a reasonable aliment was reserved. If she had done this simply, it would have been the same case with *Buchan*, and the case in this point is not altered by the intervention of the trustee.

“ In the second place, though Mrs. Rennie was a married woman, the *jus mariti* of her husband was expressly excluded in the very constitution of the life-rent right, by a third party, her brother. This is not the case of a renunciation of the *jus mariti* by the husband, in a right conferred by himself. It is the case of a total exclusion of it by a third party, establishing the right itself. Yet, even in the other case, the decisions are very strong in favour of the power of the wife to act by herself, *Keggie v. Christie*, (May 25, 1815,) in which a lease granted by a married woman, life-rentrix, without the concurrence of her husband, was sustained, in respect of a clause of renunciation in a deed of separation. There were some general words added in that case, and it was declared that the wife's receipt should be sufficient. But that was the case of a renunciation by the husband of a right otherwise vested in him, which always made a difficulty with our lawyers. Here the *jus mariti* was excluded from the first by the act of a third party, and there cannot be a doubt that in this case the receipt of Mrs.

Rennie herself was a sufficient discharge to the trustee for money paid

articles of the account, in which respectively this interlocutor found 104*l.*, 108*l.*, and 84*l.*, with 93*l.* for commission and expences, to be justly due to the respondent from Mrs. Rennie's life-rent interest in the trust estate—was also brought under review of the Inner House, and there affirmed, with additional expences, by an interlocutor pronounced on the 8th of March, 1842. A further interlocutor of the same Lord Ordinary, of the 4th June, 1842, consequential upon and giving effect to the former, decreed against the appellants for payment of 567*l.* 4*s.* 10*d.*, taxed expences, to the respondent, out of the first available rents of the trust estate, after satisfaction of the debt, was also brought, by reclaiming note, under review of the Inner House, and affirmed by an interlocutor of the 18th June.

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The appeal was against the whole six interlocutors.

Buchan could for the same purpose? The husband, by leaving the country for permanency, had ceased to exercise his office of curatory, even if that were supposed to apply to a fund like this. The wife was living in an actual state of separation, in which she must have had power to act for herself, in relation to what was her exclusive property to all the effects that were competent, that is, to the effect of satisfying the claims for aliment which were due by her.

“But it is to be observed besides, that in this case, if there were any difficulty arising from the idea of anything being done without the consent or approbation of the husband, as if any undue advantage might be taken, there is the clearest evidence that what was done, was substantially what the husband himself had recommended, and solemnly promised should be done, before a great part of the money was advanced, and the wife had, besides, the advice and concurrence of the trustee, and the very respectable man of business employed by him.

“It being certain, therefore, that the whole transaction was entered into in the most perfect *bona fides*, the Lord Ordinary is of opinion, that in the special circumstances of the case, there are no sufficient grounds for reducing it at the instance of Mrs. Rennie and her husband. Yet there is in fact no real interest now involved in the reduction, except as it may affect the question of expenses, the rights of the parties in these rents being in fact practically resolved.”

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Mr. *Anderson* and Mr. *Macqueen* for the appellants.

It has been adjudged in this case, for the first time, that a wife's alimentary fund may be assigned for debts incurred by her husband, although the contrary is expressly provided for by the deed creating the fund. By that deed it is declared, that the provision thereby made for Mr. *Rennie* was purely alimentary, and exclusive of the *jus mariti*, that it should not be attachable by arrestment or other diligence, nor *assignable*, nor subject to any deed which she, or her present or any future husband, might grant, or to any debts which they might contract. The assignment by Mrs. *Rennie* to the respondent was clearly *ultra vires*, she being only entitled to receive the produce as it accrued. Her brother, in conveying his property to trustees for the purpose of creating an alimentary fund for her and her children, had a right to annex to his gift what conditions he pleased, and if he declared any alienation of the fund, or anticipation of its produce, void, a Court of Law was bound to give effect to his declaration.

Very little, if any, of the respondent's advances were alimentary. It appears, by the accountant's report, that the greater part of the consideration for the deed consisted of moneys advanced to Mr. *Rennie* when he was going or gone to America, or on his account while he was living with his wife and family. Now, it is the law of Scotland, independently of any restrictions by deed, that

to a husband, or to his wife while residing in family with him, does so at his own risk; and where such party is aware, as the respondent was, through an intimate acquaintance with the terms of the trust deed, that the wife's provisions were alimentary, and not assignable, he cannot maintain that he made such advances on the faith of her separate property. It is also to be observed, that the deed of assignation executed by the wife without her husband being a party to it, is void by the law of *Scotland*; *Ersk. Prin. (e)*. This is too well established to require any argument.

The first mistake in this cause was Lord Ordinary *Moncrieff's* remit to the accountant, reserving all questions of law as to the ultimate liability of the trust estate. The question before him was not matter of account, but of law, and that should have been decided first; it was the Judge's duty to apply his mind to the consideration of the point of law raised by the pleadings on the validity of the deed of assignment—

[Lord *Campbell*. But it seems admitted in the pleadings that the advances for aliment were warranted by the deed, and therefore an account should be taken of them (*f*).]

The question of law is of vast importance to the people of *Scotland*, and it is desirable to have it decided, in the supreme tribunal, whether the restriction against alienation of the wife's property is to be sustained there as in

(*e*) B. 1, tit. 6, s. 33.

(*f*) His Lordship and Lord *Brougham* also, noticing a passage in the appellants' printed argument prepared in *Scotland*, expressed their disapprobation; and Lord *Brougham* said, the next time he found in any case such imputations on a judge, he would move the House to reject the case. The passage was thus: "The Lord Ordinary, whose

note is neither more nor less than an elaborate pleading on behalf of the respondent, seems to have been perfectly alive to the difficulty of sustaining the interlocutor he had pronounced, and he has very ingeniously thrown together such statements as might tend to create an impression unfavourable to the equity of the appellants' case, carefully excluding the counter evidence, &c."

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England; the upholding of it is a great security to families as well in the one country as in the other. There is no ground of difference between the laws of the two countries on this point. In *England* the wife's separate use in property is a creature of the Courts of Equity, of modern introduction, and has been established only recently and by slow degrees; but no period can be referred to in the law of *Scotland*, anterior to which, property, real or personal, might not be settled to the use of a married woman by a third party so as effectually to exclude the marital right. The doctrine is broadly laid down in *Erskine* (g), and is taken for granted in the decisions (h), not as an equitable privilege, but as matter of clear legal right. Indeed an opinion prevailed towards the end of the 17th century—founded on a refinement characteristic of the age—that a husband could not, even by antenuptial contract, renounce his right to his wife's property, because the *jus mariti* being inseparable from the character of husband, it was held that the moment the marriage took place the right recurred to the husband, "as water thrown upwards," to use Lord Stair's metaphor, "doth ever return;" *Nicolam v. Inglis* (i). The decision in that case, although followed in *Campbell v. Sandilands* (j) and *Vallance v. M'Dowell* (k), was not held in esteem, as *Fountenhall*, in a note to his report, informs us that he heard some lawyers "condemn this recurring of the *jus mariti* as a ridiculous incongruous sub-

of the husband's right. The only recent case in the *Scotch* reports on the subject is that of *Heriot's Trustees v. Fyffe* (n) in 1836, which follows *Murray v. Dalrymple*. But numerous cases have occurred in the Equity Courts in *England*, and after some conflicting decisions, the doctrine is now completely established, that property, real or personal, may be settled to the separate use of a married woman in exclusion of her husband; and that the addition of a prohibition to alienate or anticipate it, is effectual to render void any attempt of that kind by her or her husband, *Tullett v. Armstrong* (o). And hence it appears that the separate use in both countries has been constituted on the same principles, and for the same purpose, namely, the protection of the wife against the husband's extravagance or undue exercise of his power over her.

[Lord Brougham.—Was it not held in some of the cases that a naked prohibition against alienation, is not sufficient, but that to make the restraint effectual you must annex to the gift to the separate use a limitation over by way of forfeiture?]

In *Woodmeston v. Walker* (p) it was held that, without such limitation over, an *unmarried* woman could not be restrained from alienating *personal* property bequeathed to her for her separate estate without power of anticipation, *secus* as to a woman under coverture, as to whom the mere prohibition against alienation would be a sufficient restraint. All the cases were reviewed by the late Lord Chancellor, affirming the judgment of the Master of the Rolls in *Tullett v. Armstrong* (q). And his Lordship observed that "the separate estate and prohibition against the alienation of it were identified in principle, that the former could not be maintained without the latter, that the two must stand or fall together," for "that when it was once established

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(n) 12 Jurist (*Scots*), 28.

(p) 2 Russ. & Myl. 197; see

(o) 1 Beav. 1; and 4 Myl. & Cr. 390.


p. 205-6.
 (q) 4 Myl. & Cr. 392, *et seq.*

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that the separate estate of a married woman was to be enjoyed by her as a *feme sole*, it was found that to secure to her the desired protection against the marital rights it was necessary to fetter the gift of the separate estate by prohibiting anticipation, the power to do which was established by authority not now to be questioned." "In the case of a gift of separate estate," his Lordship says, "with a clause against anticipation, the author of the gift supposes that he has effectually protected the wife against such influence or controul (of the husband); upon what principle can it be that this Court should subject her to it, and by so doing defeat his (the author's) purpose, and completely alter the character and security of his gift?" These observations apply most strictly and forcibly to the case of Mrs. *Rennie*, a married woman, to whom her brother, foreseeing the husband's extravagancies, and consequent liabilities, made a provision exclusive of his rights and obligations, and with a clause prohibiting, in the strongest terms, all sorts of alienation or anticipation of the income.

The Lord Advocate and Mr. *Baillie* (of the Scotch Bar) for the respondent.

The main question in this case regards the validity of the deed of assignation, so far as it assigned Mrs. *Rennie's* life interest in the trust property. To that extent only



deed of assignment was not a devolution of the trust from the trustee upon a third party, nor a conveyance of the property, but an assignment of the accruing rents in security for repayment of advances, operative merely until the debt secured by it should be paid, and conveying no power beyond that of collecting the rent and applying it to the extinction of the debt. The two granters, therefore, assigned no more than they were fully empowered to grant. The trust disposition expressly gave the trustees "full power to sell and dispose of all or every part of the property as to them should seem proper and necessary in executing the purposes of the trust." The first of those purposes was to pay the truster's debts from the produce of the trust estate, "either by gradual liquidation thereof or otherwise." The second purpose was to pay Mrs. *Rennie* "the free annual proceeds of the property, or such part thereof as the trustees should deem necessary for the support of her and her family." These references to the trust disposition leave no room to dispute the power of the trustee to deal with the rents as he did by the deed of assignation.

The power exercised by Mrs. *Rennie* has been more seriously disputed, in consequence of the truster's declaration, that the provision for his sister was "purely alimentary, and exclusive of the *jus mariti*," and that it should not be assignable nor subject to any deeds which either she or her husband might grant, or debts which they might contract. It might be fairly argued, that this prohibition was not intended to attach to the whole of the rents of the trust estate, but only to 60*l.* a-year, fixed by the trustee, with Mrs. *Rennie's* consent, as her alimentary fund. But even if no sum had been fixed as alimentary, still the prohibition against attaching or assigning does not by the law of *Scotland* operate as an absolute exclusion of assignment in all circumstances; as, for instance, alimentary creditors, for aliment supplied in any year may attach

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the alimentary fund of that year, or so much of it as was not necessary for aliment; *Earl of Buchan v. His creditors* (r), *Waddell v. Waddell* (s).

The objection to the validity of the assignment, on the technical ground of its having been executed without the husband's concurrence, is not applicable to the circumstances of this case, although the general principle is not to be disputed, that to give validity to the wife's deed the husband's consent is necessary. That principle, like all general rules, is liable to exceptions. Here, in the constitution of the fund for the wife, the husband's right of administration is excluded; and here also the husband was abroad. Was the wife with the children to perish for want of necessaries until he returned? While husband and wife are in a state of separation, voluntary or involuntary, her deeds, in relation to her separate estate, are valid without his formal consent. The necessity of the case brings it within the exceptions to the general rule; *Gairns v. Arthur* (t), *Neilson v. Arthur* (u), *Orme v. Diffors* (v), *Gray v. Wylie* (w). In point of fact, the husband did consent to the wife's deed in this case, as is clearly evidenced by his letters to the respondent, in one of which he writes—"For the advances you have made and will have to make to my family as well as to myself, I shall, immediately on getting back, enter into, with Mrs. Rennie's concurrence, a regular deed of agreement, giving and

the trust property. It appears by the recitals of the deed, and by the accountant's report, that a great part of them went to pay debts, and interest of debts, with which Lieutenant *Robertson* had burdened the trust property. If those payments had not been made, the creditors would have attached and carried off the property, as they were entitled to do, for their reimbursement, so that the alimentary fund would be lost altogether. The trustee, having been authorised, under the trust disposition, to sell all or part of the trust property, and out of the produce to pay the truster's debts, "by gradual liquidation or otherwise," instead of selling, charged the property with repayment of those advances, with the concurrence of Mrs. *Rennie*, and thereby the property was preserved to her and to her children after her. How can it be argued that the trustee and Mrs. *Rennie* were not warranted by the trust deed, as they were by law and common sense, in effecting this "gradual liquidation" of debts, by executing the assignation to the respondent? The same argument may be urged, with equal force, in respect of another part of the respondent's advances, which were applied to the payment of public and parochial taxes, and of workmen for repairs of the trust property. These repairs were, by the trustee's order, executed under the superintendence of Mr. *Rennie*, and the property was thereby made to produce a greater rent, which was drawn by Mrs. *Rennie*, and applied to family expenses. The tradesmen's accounts had lain over a long time, and actions had been commenced to constitute these debts against the property, and then proceed to attach it; so that these advances also, like the former, went to save the trust property.

After Mr. *Rennie* went to *Canada*, his wife was left with the children quite destitute. The extracts from her letters to the respondent, set out in his printed case, shew that from week to week she importuned him, in the most piteous terms, to supply her with the means of procuring

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the common necessities of life. Surely moneys advanced for these purposes, from pure compassion, at the request of the trustee, joined to her own, and on the faith of repayment out of the rents of the trust property, must be admitted to be alimentary supplies; to hold the contrary would be a dangerous precedent, as contrary to law as to common sense and humanity. Although a married woman, living with her husband, cannot legally bind her separate estate to pay debts contracted by him, though they be for aliment, it is otherwise if she is living apart from the husband, as Mrs. *Rennie* was when these alimentary advances were made to her. The case of the appellants is made to rest chiefly on the objection to the moneys advanced to Mrs. *Rennie*, while Mr. *Rennie* was living with her, and to him, after he left for *Canada*. This last sum, composed of 50*l.* and 20*l.*, was transmitted, by desire of the trustee and of Mrs. *Rennie*, to her husband, while he was seeking for a livelihood abroad for his family; the other sums advanced before his departure went to the support of the family; and all the advances may be properly denominated alimentary. It could not be Mr. *Robertson's* intention, in providing an alimentary fund for his sister, that she should use it as mere pocket-money, for her personal ornament and gratification; it was expressly given "for the support of her and her family,"

Lord *Campbell*.—This case turns upon the validity of a deed of assignation. The respondent brought a process of declarator to have this deed found valid ; and the appellants, a process of reduction, to have it set aside. The two processes being conjoined, several interlocutors have been pronounced by Lords Ordinary, and by the Second Division of the Court of Session, the effect of which is to decide, that as far as the interest of the appellant, Mrs. *Rennie*, is concerned, the deed is valid.

As it appears to me that the conduct of the respondent in the transactions was honourable, and that the object of the parties to the deed was fair, I regret very much to be obliged to come to the conclusion, that it cannot be supported, and that the interlocutors appealed against ought to be reversed. Notwithstanding the great anxiety displayed by Lord *Moncreiff*, I am bound to say, that I think the cause has not been “extricated by him with safety to the law.” We have to lament that the Judges of the Second Division have not favoured us with their sentiments upon any of the important and difficult questions which were discussed before them, and we must suppose that they adopted *simpliciter* the note of the Lord Ordinary.

Three main objections were made to the validity of the deed ; 1st, that it was a breach of trust in Captain *Barclay* ; 2dly, that it was void by reason of Mr. *Rennie*, the husband, not being a party to it ; and 3dly, that it was *ultra vires* in assigning an alimentary fund provided for the maintenance of a married woman, declared by the settlor not to be assignable.

Lord *Moncreiff* was of opinion that Mr. and Mrs. *Rennie* were not at liberty to object to the validity of the deed of assignation, because they are supposed to have promised Mr. *Ritchie* a security of this sort for his advances, made at their request. But to give effect to such

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promise would entirely deprive a married woman of the protection intended for her, by conveying property to a trustee for her sole and separate use: a promise involving a breach of trust could not be enforced, and no such promise by a person under disability can prevent that person, if prejudiced by the breach of trust, from complaining of it.

Now, I am of opinion that Captain *Barclay* was guilty of a breach of trust to the prejudice of Mrs. *Rennie*, by executing the deed of assignation. By the settlement of Lieutenant *Robertson*, the second trust was, that the trustees should pay to Mrs. *Rennie*, his sister, if she survived him, the net annual proceeds of the property conveyed, or such part thereof as they might deem necessary for the support of her and her family during her life, "declaring that the foresaid provision for my said sister is purely alimentary, and exclusive of the *jus mariti* of her present or any future husband; and that it shall not be attachable by arrestment or diligence of any kind whatever, nor assignable, nor subject to any deeds which either she or her present or any future husband may grant in relation thereto, or debts which they may contract." By the settlement the trustees are to manage the trust property, paying the settlor's debts, and, after the death of Mrs. *Rennie*, to hold the property for the benefit of her children. But by the deed of assignment, Captain *Bar-*

355*l.* 11*s.* 9*d.*, with interest, after which Mr. *Ritchie* was to reconvey to the trustee. But while this deed is in operation, Captain *Barclay's* functions as trustee are suspended. He cannot manage the trust property, and he cannot exercise his discretion as to whether a greater sum than 60*l.* a-year from the annual proceeds of the trust property should or should not be allotted to Mrs. *Rennie* for the support of herself and her children. The discretion of the trustees upon this subject was to be exercised from time to time, according to the state of the fund and the circumstances of the family. No power is given to the trustees appointed by the settlement to name another trustee for the management of the property, or to disqualify themselves from exercising the discretion reposed in them. The deed of assignation therefore appears to be *ultra vires*, and a breach of trust; and the offer made by the respondent to denude the property when the debt due to him is liquidated, must be unavailing.

Secondly, I am likewise of opinion that the deed is void, on the ground that it was executed without the concurrence of the husband. It was admitted at the Bar that Mr. *Rennie's* concurrence would have been necessary if he had been living with his wife, and that it is to be excused only by his absence in *Canada*. There can be no doubt that, by the law of *Scotland*, under certain circumstances, a married woman may contract obligations and execute deeds as if she were single, but that is where the husband has been convicted of a crime, by which he is civilly dead; or where he has deserted his wife, and the coverture is virtually dissolved or suspended. But here there was merely a temporary separation by mutual consent, Mr. *Rennie* intending to return to *Scotland* if he could not advantageously settle in *Canada*; and Mrs. *Rennie* intending to follow thither, if he could. The case therefore does not vary from any

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temporary absence of the husband for business or pleasure, during which his curatorial rights over his wife are not suspended.

The third objection to the deed is still more material. It is not disputed that the law of *Scotland* recognizes the settlement of property as an alimentary provision for a married woman, and that may be made not assignable, or subject to debt or diligence, according to the principles upon which many cases have been decided in *England*, which are all to be found cited in *Tullett v. Armstrong* (s). But it is said that there is an exception in favour of alimentary debts, and that the items in the accountant's report, making up the aggregate of 513*l.*, are for alimentary advances to Mrs. *Rennie*. It is unnecessary here to inquire how far an alimentary fund can be anticipated for past alimentary debts, because it seems to me quite clear, that none of these items were the alimentary debts of Mrs. *Rennie*. The advances were to Mr. *Rennie*, or for the support of the family, while he was living in *England*, and for the whole amount he was personally liable. The debts therefore were the debts of the husband, and not of the wife; and for the debts of the husband, I am of opinion that an alimentary fund, so appropriated for the maintenance of the wife, cannot be assigned. Lord *Buchan*'s case (y) is not at all in point, and the case of *Hunt v. Hunt* (z) appears to be in point.

account, as, on these grounds, before stated, I am of opinion that the interlocutors, supporting the validity of the deed of assignation, must be reversed.

The pursuer's summons contains an alternative conclusion to take the account if the deed should be held invalid; but the account has not yet been taken on this footing. It would give me great satisfaction if this could now be done by consent between the parties, after the opinion of the House has been expressed; but if this cannot be done, the cause must be remitted, that, with the declaration of the invalidity of the deed of assignation, the account may be taken in the Court below, on the footing of the original settlement.

This, my Lords, is my humble opinion; and therefore I move your Lordships that the interlocutors complained of be reversed.

Lord *Brougham*.—I take the same view of this case; I consider the miscarriage of the Court below, upon all the grounds, to be clear. Indeed, with all possible respect for Lord *Moncreiff* (my respect for whom I need not say is equal to that of any person, from my long knowledge of his great talents, his profound learning, and his admirable judicial powers of every description), I find it impossible to reconcile this case with principle. Moreover, I really find it very difficult to reconcile it with another decision of Lord *Moncreiff*; I mean the decision in the case of *Heriott's Trustees*, which appears to me to put one part of the case, as one principle involved in the case, very clearly.

I listened also to the objection that was taken to an account being directed, while there was a point of law to be decided. Now that clearly was not a matter to go before an accountant to be mixed up at all with the account; and having separated that, and having now come to the resolution of deciding against the validity of the instru-

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ment, and of reversing the decree, I most heartily join with my noble and learned friend in the wish expressed by him, that by some arrangement further expense of litigation to the parties may be avoided. If your Lordships shall be of opinion that this judgment ought to be reversed (as you probably will), I would then fain hope that the parties might come to some understanding as to taking the account upon the alternative conclusion of the libel, and thereby upon this point avoid a more than necessary continuance of litigation.

Lord *Cottenham*.—It appears to me that if this interlocutor were to stand, it would be impossible hereafter to secure the interests of a married woman. In this country, as in *Scotland*, it has been found necessary for the interests of society that means should exist, by which either the parties themselves by contract, or those who intend to give a bounty to a family, may secure that for the benefit of the wife and children, without its being subject to the controul of the husband. In this country it is well known that that doctrine has been subject to considerable fluctuation from the time that it was first established, though it is now very firmly established, and no difficulty occurs as to the mode of carrying that object into effect.

When, first, by the law of this country, property was

ticipation of the income of the property, so that she had no dominion over the property till the payments actually became due. That is the provision of the law as it now stands, and that is found perfectly sufficient for the purpose of securing the interests of married women.

In *Scotland* much the same course is adopted, the same objects have been worked out, though not precisely in the same way ; but still there is by the law of *Scotland* a protection in favour of an alimentary fund ; and there is a provision that the alimentary fund shall not be assignable. Those are two provisions very much corresponding with the provisions which have been adopted in the law of *England*. But if the present deed were to stand there would be an end of that protection. This is not only an alimentary fund in its nature, but it is in terms declared to be so. It is declared not to be assignable ; but it has been assigned, not for past aliment for the wife and her family, but for expences incurred for the convenience of the family at large, or for the private expenditure of the husband. I think, therefore, upon that ground that this deed is clearly bad. It is also clearly bad, as being a direct breach of trust. Captain *Barclay* had no right whatever to divest himself of the duties which he had assumed, and to transfer to others that discretion which was personal to himself.

It is quite unnecessary to find other grounds upon which to impeach this deed, the first being clearly and manifestly an objection which prevents this deed from acting and prejudicing at all the interests of the parties ; and, therefore, the interlocutor which gives effect to the deed, I consider as clearly erroneous ; whatever may be the interests of the parties they are to be considered as existing independently of that deed.


My Lords, that is quite sufficient for the purpose of disposing of the subject-matter of this appeal. But, although the accounts had been investigated before it was ascertained

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what the application of the law would be upon the particular findings of the accountant, it may be that what has already been done may save the expence of future inquiry. That, however, I do not consider to be now before us ; because the Court of Session having decided upon the first claim in the summons, the alternative conclusion has not been a matter of consideration in that Court, and I apprehend that the order of this House suggested by my noble and learned friend, would entirely answer the purpose—that is, reversing the interlocutors appealed from, and referring it back to the Court of Session to see whether there is any thing else that may be done, independently of the deed, for the purpose of doing what is right between the contending parties, claimants upon this fund. I have no doubt that if the parties can arrange it privately, generally speaking, it answers the purpose of both parties better ; but, if they cannot agree, I do not anticipate any difficulty in the justice of the case being satisfied by whatever interlocutor the Court of Session may think proper to make, or may find themselves competent to make upon the pleadings, this House declaring that the deed is to be considered as void.

The counsel for the appellant said that their client was disposed to accede to the arrangement just suggested, to let the account already taken stand. The respondent's



RICHARD GORDON	-	-	<i>Appellant.</i>	1845.
MATHEW HOWDEN	-	-	<i>Respondent.</i>	April 22-28.

Two persons entered into an agreement to be partners in the business of pawnbrokers, to be carried on under the firm of one of them; and in pursuance of the articles of agreement that one's name alone was painted over the door of the business premises; the licence also was taken out, and the tickets to the customers were issued, in his sole name, while the other partner (carrying on another business) attended occasionally to inspect the books of the firm, and drew a certain per centage on his share of the capital out of the profits:—

*Pawnbrokers.
Secret
Partnership.
Stat. 39 & 40
Geo. 3, c. 99.*

Held, that the agreement constituted a secret partnership, and was therefore illegal and void, as being in contravention of the policy and enactments of the Statute 39 & 40 G. 3, c. 99.

THE appellant was trustee on the sequestrated estate of Mrs. Munro, widow and executrix of *Daniel Munro*, deceased, formerly pawnbroker in *Edinburgh*.

The respondent carried on the business of a pawnbroker in premises in *Dickson's close, Edinburgh*, for several years previous to the year 1828, when he took *John Kidd* into partnership. The pawnbroking business was, from that time till 1833, carried on in the same premises by *Kidd*, whose name was substituted over the door for the respondent's. In 1833 *Kidd* withdrew, and the respondent entered into partnership with *Daniel Munro*, agreeing by deed "to be partners in carrying on a joint trade and business as pawnbrokers in *Edinburgh*, under the firm of *Daniel Munro*, for five and a half years, during which time it is stipulated that the said *Mathew Howden* shall give such assistance as he can with convenience to himself, in the management and conducting of the business, he hereby reserving full power to continue his business as ap-

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praiser and auctioneer, and to act otherways on his own account, while the said *D. Munro* binds himself not to carry on any separate business, but to devote his whole time and attention in conducting the business of this co-partnery; and for the better regulating and carrying on of said business, the said parties have resolved and agreed upon the following articles:

"1st. That the capital shall consist of the sum of 2000*l.*, 1500*l.* thereof to be advanced by *M. Howden*, and the remaining 500*l.* by *D. Munro*, and that in such proportions, and at such periods as shall be required to carry on the business, &c.

"2dly. That all bonds, bills, contracts, accounts, and other writings relating to the said business, shall be taken and given under the fore-said firm of *Daniel Munro*, the said parties shall keep, or cause to be kept, regular and distinct books, containing all the affairs and transactions of the said joint business; and they shall post and bring forward, or cause to be posted and brought forward, the books of the concern from time to time, and the books shall be brought to a balance at least every twelve months, &c.

"3dly. That in respect the said *M. Howden* is to advance the capital to the extent before stated, he shall be entitled to the sum of 150*l.* for the first year, and 180*l.* per annum for the remaining four and a half years, out of the first and readiest profits of the said business, and that he shall be entitled to draw the same regularly, half-yearly, at the terms of, &c.

"But on the other hand, it is so stipulated that *D. Munro* shall be entitled to the whole residue or remaining profits of the business, whatever the same may amount to, to be uplifted by him, either at said terms, or if he shall prefer it, to continue to be employed in the business.

"4thly. That as it may be some time after the co-partnership shall

"7thly. That upon the dissolution of the copartnery the books of the concern shall be brought to a balance, and the proceeds of the copartnery funds applied, first, in paying the debts due by them, and thereafter in paying back to the parties respectively their shares of the capital, and in paying *M. Howden* his share of the profits then due; the whole residue to belong to *D. Munro*.

"8thly. The said parties agree, that if any difference shall arise betwixt them anent the true meaning of any part of this contract, or otherwise, in relation to the copartnery, they hereby agree to submit and refer the same to *Andrew Rutherford, Esq., Advocate*, whom failing, to *Thomas Walker Baird, Esq., Advocate*, either of whose decreet arbitral to be pronounced shall be final and binding upon all parties."

Munro entered into possession of the premises in *Dickson's Close*, in pursuance of the contract; his name alone was painted over the door; the license was taken out, and the duplicate tickets and notes to customers were issued in his name alone. He died in *June, 1836*, leaving a will, in which he appointed his wife his executrix. She proved the will, and continued in the management of the pawnbroking business until the 14th of *April, 1837*, when, in consequence of having become embarrassed in her circumstances, her estate was sequestrated, and the trustee appointed to the sequestrated estate, took the management of the business for the benefit of the creditors.

On the 29th of the same month (*April, 1837*) the respondent presented a petition to the Sheriff of *Edinburgh*, stating the said contract of partnership, and that the same was dissolved by the said bankruptcy, and praying to be put in possession of the partnership effects for the purpose of winding up the concern. Upon that application the Sheriff pronounced an interlocutor, finding that the respondent was entitled to such possession, as the only solvent partner of the late firm, and he gave him possession accordingly.

In the year 1841, the trustee on the sequestrated estate brought an action against the respondent for an account of his intromissions with the partnership effects, and for reduction of the Sheriff's interlocutor, and

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also of the deed of partnership as void under the Pawnbrokers' Act (a).

The respondent pleaded in defence, that the deed of partnership did not fall within that statute; that, if it did, the proceeding thereby directed should have been taken before the Justices of the Peace, within twelve months after the offence committed, and that the Sheriff's decree had been acquiesced in by the trustee for four years.

On the 28th of May, 1842, the Lord Ordinary (*Cockburn*) pronounced an interlocutor, sustaining the reasons for reduction of the contract and of the Sheriff's interlocutor, and decerning in the terms of the reductive conclusions (b).

(a) 39 & 40 G. III., c. 99. By sect. 23, it is enacted, that "For the better manifesting by whom the trade or business of a pawnbroker shall hereafter be carried on (from and after the commencement of this act), all and every person or persons who shall follow, or carry on the trade or business of a pawnbroker, shall cause to be painted or written, in large legible characters, over the door of each shop or other place by him, her, or them, respectively made use of for carrying on that trade or business, the christian and surname or names of the person or persons so carrying on the said trade or business, and the word 'pawnbroker' or 'pawnbrokers,' as the case may be, following the same, upon pain of forfeiting the sum of 10*l.* for every shop or place which shall be so made use of for the space of one week without having such name or names and the said word so written as aforesaid, to be recovered by distress and sale of the offender's goods and chattels by warrant, under the hands and seals of any two Justices of the Peace."

Against this interlocutor the respondent reclaimed to the Inner House, and their Lordships, after ordering cases to be prepared by the parties, and subsequently advising thereon, pronounced an interlocutor, 23d February, 1843, “altering the said interlocutor of the Lord Ordinary, and repelling the reasons of reduction in so far as they proceeded upon an alleged violation of, or agreement to violate, the Pawnbrokers’ Act: *quoad ultra*, remit to the Lord Ordinary, &c. Find the defender entitled to expences, &c. (c).”

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The appeal was against this latter interlocutor.

being a partner to be found. It was unknown to the public and to the law. The Lord Ordinary holds the English case of *Warner v. Armstrong* (3 Myl. & K. 45), to fix that the illegality of the copartnership must be taken to be the legal consequence of this secrecy. Even though there had been a difference of opinion on that case between some of the Common Law Judges and the Judges in Equity (which, however, does not clearly appear), the Lord Ordinary would prefer the opinion of the Lord Chancellor, not only because it decided the case, and is the latest authority, but because he agrees with it. He concurs in its view of the meaning and policy of the statute.

“The defender’s chief pleas against this result are :—

“1st. That the statute only imposes penalties, and that even these cannot be sued for after a year for a breach of the act. The Lord Ordinary thinks that these are penalties for irregularities committed in the course of conducting a trade not otherwise struck at by the act, and that a statute condemning secret partnership, on grounds of public policy, cannot be defeated, and the secret partnership enforced merely by paying these penalties, or by a failure to exact them timeously.

“2d. That *in turpi causâ melior est conditio possidentis*. But whatever effect this maxim might have had, as between the original parties, the Lord Ordinary does not think it applies to the circumstances of the present case, in which all that has taken place is, that a trustee acting for creditors, and misled by the erroneous interlocutors now brought under reduction, has hitherto dealt and accounted with the defender as if the copartnership was lawful. Besides, the defender was not content originally with his mere possession, but expressly founded on the contract, as the ground for his obtaining the interlocutors which he got from the Sheriff, and which are now under reduction.

“What effect this reduction may have on the new accounting, the Lord Ordinary does not now say, because the only conclusions debated are the reductive ones.”

(c) 5 Bell, Murr., Don. & You. 698.

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The Lord Advocate and Mr. *F. Shand* (of the Scotch Bar) were heard for the appellant, and Mr. *G. Turner* and Mr. *Peacock* for the respondent.

The arguments were chiefly applied to the construction of the Act of Parliament 39 & 40 G. 3, c. 99, and were much to the same effect as those reported in the cases of *Armstrong v. Lewis* (d), and *Armstrong v. Armstrong*, and *Lewis v. Armstrong* (e).

The Lord Chancellor.—We are of opinion in this case, that the judgment of the Court below cannot be sustained.

With reference to the main point that has been under consideration—the policy of the law requires that all persons who carry on the business of pawnbroking shall publish their names to the world. There are many reasons which have been assigned for this, into which it is not necessary for me now to enter, after the decisions that have taken place upon the subject.

When this question came before the Court of Exchequer Chamber in the case of *Armstrong v. Lewis* (f), that Court decided that a secret partnership in the pawnbroking business was illegal. The question afterwards came before Sir *John Leach*, M.R., and he also, in express terms, decided that a secret partnership in the pawnbroking business was contrary to law (g). That case was brought for rehearing before my Lord *Brougham*, when he held

d himself been a pawnbroker, and carried on that business for a considerable time, and it was very difficult to suppose that he was not acquainted with the law connected with this subject. He afterwards, carrying on another business, wished to take a partner into the business of pawnbroking, and for that purpose he took in *Daniel Munro*, and a partnership was formed between them. But the first stipulation of that partnership contract was that the business should be carried on under the firm of *Daniel Munro*, which imports that it was to be carried on in that name alone, and that *Howden's* name was not to be mentioned in the firm. Now the act of Parliament requires that persons carrying on the business of pawnbrokers shall put their names over the door—the names of all the persons carrying on the business. If then the partnership contract stipulated that the business should be carried on in the name of *Daniel Munro* alone, that was impliedly a stipulation that *Daniel Munro's* name alone should be placed over the door, and, even in that view of the case, the transaction would have been illegal. It was further stipulated that all bills and other instruments should be drawn wholly in the name of *Daniel Munro*, and all these circumstances appear to me to lead to the conclusion (and it requires some evidence on the other side to prove that that was not the intention of the parties,) that *Daniel Munro's* name alone should be known in the business, and that it should not be known to the world that he had any partner. It was to be a secret partnership from the very terms of the contract.

It is quite consistent with this case that the parties might have reserved to themselves the right of communicating to the world that *Howden* was also a partner, but it requires some proof on the other side, I think, to show that that was the intention of the parties. From the terms of the contract I think I am justified in inferring—and I can come to no other inference—that it was the intention of

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the parties that *Muir* alone should be known in the business, and that it should not be known that *Howden* had anything to do with the concern.

I think the points alluded to in argument, in respect to the arbitration, and also the registration, have been satisfactorily answered by the Lord Advocate. If any contests arose, these contests should have been rather presented to a Court of Justice than to private arbitration. And as to the registration, I apprehend that that was a matter of mere form, which was never acted upon, and which never probably was intended to be acted upon.

For these reasons, I am of opinion that the judgment of the Court below should be reversed. If the opinion which I have expressed is correct, the interlocutor of the sheriff was incorrect, and ought to have been reversed by the Lord Ordinary, and in that case it is proper that that interlocutor, as well as that of the Court of Session, should be reversed here.

It does not appear to me that any other question arises.

Lord Brougham.—I so entirely agree in the argument so forcibly, and so correctly stated, by my noble and learned friend, that I shall not trouble your Lordships with more than a word or two upon the subject. I hold it to be perfectly clear that this was an illegal contract, for the

were exposed to suspicion, and held to be a suspected class of individuals, and that it was treating them with indelicacy so to consider the act and so to construe it. I remember my answer to that was a very obvious one,—and which occurred to every one upon looking to the policy of that very beneficial act,—that no honest, respectable pawnbroker, would feel that there was any impropriety, or any indelicacy in being called upon to disclose his name, and the name of his partner with whom his business of pawnbroking was carried on; that it tended to prevent dishonest and fraudulent proceedings, oppressive to the poor, as well as fraudulent in themselves, and tended to the encouragement and protection of fair traders, and to separate them from unfair traders; that no person therefore, had any right to complain of the Act of Parliament, or of the mode of enforcing it.

My noble and learned friend was Lord Chief Baron at the time that the case of *Armstrong v. Lewis* was sent to the Court of Exchequer.—

The Lord Chancellor.—I was; and another noble and learned lord now present was counsel in the cause (i).

Lord Brougham.—And it appears in the report that he was on the failing side. But be that as it may, I entirely concur in the argument and in the view taken of the subject by my noble and learned friend (the Lord Chancellor).

Now as to what has been said with respect to the clause which requires an arbitration to settle disputes, such disputes must be settled, as my noble and learned friend stated, somehow; but in apprehending how that was to conduce to publicity, I am labouring under the same difficulty as my Lord Advocate was. But I conceive the most effectual publicity would have been to leave the law to take its course, and let the disputes that might arise under the partnership be brought into public Court; but says Mr. *Howden*, “Let it be done by Mr. *Rutherford*,

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(i) Lord *Campbell*; see 2 Crompt. & M. 292.

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and if Mr. *Rutherford* cannot take it, take Mr. *Walker Baird*." Very well, the publicity was so great that they confided their secret to one individual, instead of confiding it to the whole Court and to all mankind. How that was to operate publicity, I cannot tell.

As to registration, it is obvious that they need not register at all. If there had been a stipulation requiring, under a penalty, that it should within six months, or within any reasonable time, be recorded in some public register, a very different aspect would have been given to the instrument. But that is not so. What the effect of that would be it is needless to stop to inquire; there is nothing of the kind at all; I am, therefore, clearly of opinion that the sheriff's interlocutor was wrong, and that my Lord *Cockburn* was perfectly right in rescinding it; and I am of opinion that the Inner House, in altering the interlocutor of Lord *Cockburn*, were entirely wrong, and we must now reverse that decision.

Lord *Campbell*.—I have very little to add to what has been stated by the two noble and learned lords who have preceded me. I was counsel in the case of *Lewis v. Armstrong*, and I had the misfortune of being on the weak side instead of the right side; but I do not doubt that the proper construction was put upon the act of Par-

the agreement expressly stipulated that the business should be carried on under the firm of *Daniel Munro*. Then, if it were to be carried on under the firm of *Daniel Munro*, it would be wholly inconsistent with that stipulation to put over the door the name of *Howden*, because the business then no longer would be carried on under the firm of *Daniel Munro*, but under the firm of *Munro and Howden*. Then there is an express clause in the act of Parliament, which declares that, "from and after the commencement of this act, all and every person or persons who shall follow or carry on the trade or business of a pawnbroker, shall cause to be painted or written, in large legible characters, over the door of each shop or other place, by him, her, or them respectively made use of for carrying on that trade or business, the christian and surname or names of the person or persons so carrying on the said trade or business." Then if the act of Parliament is carried into effect, the agreement is void; if the agreement is carried into effect, the act of Parliament is violated; they cannot stand together. Mr. *Peacock*, in a very ingenious way, in the stress of his argument, says there was a stipulation that the partner whose name was not to appear was to assist. That makes the thing worse, because he carries on the business, and if so, then his name should have appeared over the door. But it is expressly stipulated, that his name should not appear over the door. That construction of this clause of the agreement, and of that section of the act of Parliament, are quite sufficient to dispose of the case, and to show that this agreement is contrary to the act of Parliament.

Ordered that the interlocutor complained of be reversed, and that the cause be remitted to the Court of Session, with directions to adhere to the interlocutor of the Lord Ordinary (of the 28th May, 1842); and to decern in the terms thereof: And further ordered that the respondent do pay to the appellant the costs to which the respondent was found entitled by the interlocutor of the 22d February, 1843, if paid by the appellant; and do pay the appellant the costs incurred by him in the Court of Session in that cause.

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1844.	THE DUKE OF BEAUFORT	-	-	<i>Appellant.</i>
March 12-19 ;	JOSEPH NEELD, WILLIAM TAYLER, and } Others	-	-	<i>Respondents.</i>
April 23-29.				
1845 :				
April 28, 29 ;				
May 5, 23.				

Inclosure acts. The 6 & 7 W. 4, c. 115, (extended by the 3 & 4 Vic. c. 31,) authorizes exchanges of lands on conditions therein prescribed. One of these is the written consent of the owners of the lands intended to be exchanged. The landowners of a parish determined to carry this act into execution, and appointed a commissioner for that purpose. *B.*, one of the landowners, authorized his agent to attend for him at the meetings held for the purpose of carrying the act into execution, but desired him not to exchange a particular wood except for woodland. *N.*'s lands were to be exchanged against those of *B.*, and this restriction was communicated to *N.*'s agent, who, being asked to exchange another wood against the wood in question, said that his principal had no power to do so. This answer was communicated to *B.*, who took no further notice of the matter. The restriction on the authority of *B.*'s agent did not appear to have been brought to the knowledge of the commissioner. The commissioner prepared and *B.* signed a written consent to ratify the exchange of certain closes belonging to him, and designated in the consent by numbers. Among the closes thus designated was the wood in question, but the number by which it was referred to in the consent, and in a map and plan previously submitted to *B.*'s inspection, was not the same as that which it bore in *B.*'s private map of his own

HELD, *N.* was entitled to an injunction, as prayed by his bill, and that *B.* had no equity on which to ask for the interference of the Court in his favour.

The Statute 6 & 7 W. 4, c. 115, gives to persons dissatisfied with anything that has been done under its provisions an appeal to the Quarter Sessions.

This would not deprive a party aggrieved of his right to apply for the interference of a Court of Equity, if he was in other respects entitled to that interference.

The House may, in its discretion, allow a document to be referred to in argument, although it has not been printed in the papers laid before the House, according to the directions of the Standing Order, No. 181, (Feb. 24, 1813.)

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Jurisdiction.

Practice.

THE 6 & 7 W. 4, c. 115, which was passed "to facilitate the inclosure of open and arable fields in England and Wales," appointed the mode in which such inclosures should be made, and directed the parties interested in making them to appoint a commissioner, who was empowered, in the way therein directed, to carry the provisions of the act into execution. Four-fifths of the proprietors were to agree to rules for the guidance of the commissioner, and to agree to a map or plan which should be binding upon him, but these agreements, made by the majority of the proprietors, were to be subject to an appeal to the Court of Quarter Sessions, at the suit of any proprietor, who was also to have a right to a feigned issue to try the merits of the award of the commissioner, should he be dissatisfied therewith. The 35th section empowered the commissioner to make exchanges of land among the different proprietors, "provided that all such exchanges shall be ascertained, specified, and declared in the award of the said commissioner, and be made with the consent in writing of the proprietor of the hereditaments and premises which shall be so exchanged, or of the attornies of or acting for such proprietor, such consent to be testified in writing, under the hands of the consenting parties

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thereto. And all and every such exchange so to be made, shall be good, valid, and effectual in the law, to all intents and purposes whatsoever." The 53d section enacted, that "it shall be lawful for all persons who shall think themselves aggrieved by any thing done by virtue of this act, to appeal to the General Quarter Sessions of the peace for the county, &c., wherein the lands are situated, within six calendar months next after the cause of complaint shall have arisen, first giving twenty-eight days' notice thereof to the commissioner, or to the parties intended to be appealed against; and the Justices at the Quarter Sessions are hereby authorised and required to hear such appeal, and to make such order in every such case respectively, and to award such costs as to them in their discretion shall seem meet; and every determination of the said Justices shall be final and conclusive for all the parties concerned, and shall not be removable by *certiorari*, &c." The 3 & 4 Vict., c. 31, which was passed to amend this act, declared that (section 1), "subject and without prejudice to the right of appeal given by the said act, all awards that shall be made, in pursuance of that act and of this act, or either of them, shall, immediately after the execution thereof, be conclusive evidence that the provisions of the said acts have in all respects been complied with, and that all necessary consents have been given; and no other evi-

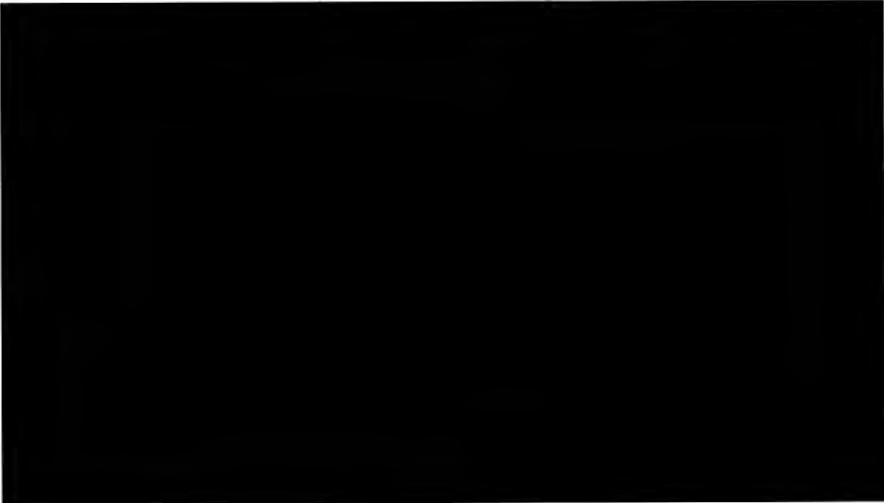
present, by themselves or their agents. It was then resolved that it was expedient to effect an inclosure of the open and common lands of the parish, and Mr. *W. Tayler* was selected by the meeting to be the commissioner for the purpose; and at a meeting, held some months afterwards, was duly appointed to that office. On the 10th of January, 1839, the commissioner held his first meeting, which was attended by Mr. *Wedge* and Mr. *T. Little*, and several other persons. At this meeting a surveyor, for the purposes of the intended inclosure, was appointed. A map of the lands of the parish, taken from one used for the purposes of the Tithe Commission, and drawn on silver paper, had been previously prepared, and the inclosed lands, or old inclosures, were designated by figures on the map, and a terrier was also prepared for the purpose of explaining the map and the references. The map and terrier were produced at the meeting, and were inspected and examined by Mr. *Wedge*, who was at the same time furnished with a copy of the terrier. A spot, marked No. 12 in this map, was described in the terrier under the head of "old inclosures" in the following terms: "Landowner, *Beaufort, Charles Henry*, Duke of—(occupier) himself—(No. on plan 12). Description: Dunley, 5 acres (state) wood; 6 acres, 0 r. 0 p." On the 1st of June, 1839, the Duke of *Beaufort* signed and sent to the commissioner a written consent or authority in the following words:—"To Mr. *William Tayler*, the commissioner appointed for dividing, allotting, and inclosing the open common, arable, meadow, and pasture lands and fields, in the parish of Littleton Drew, in the county of Wilts, under and by virtue of an act passed in the sixth and seventh years of the reign of his late Majesty King William the Fourth, intituled, &c. I, Henry Duke of Beaufort, being the proprietor of lands and hereditaments in the parish of Littleton Drew aforesaid, do hereby consent to give up in exchange for such other lands of an

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equal value, within the same parish, as you, the said commissioner may consider desirable for me, the several old inclosures, or pieces or parcels of land, marked and numbered respectively on the map of the said parish of Littleton Drew, 10, 11, 12, 13, 14, 22, 24, 25, 27, 30, 99, 113, 546, 553, and 554, and I do hereby undertake and agree to ratify and confirm whatsoever you, the commissioner, may do in the premises. Dated the 1st day of June, 1839.—BEAUFORT."

The commissioner made his allotments before the 29th of September, 1839; and, among other things, directed exchanges of certain lands then belonging to the Duke of Beaufort and Mr. Neeld respectively. These exchanges were alleged to have been made with the consent of *Wedge*, the Duke's agent. Among the lands of the Duke thus directed to be exchanged and allotted, was a close described in the following terms:—"Dunley Wood, otherwise called Dunley Gorse, otherwise Dunley Five Acres, containing six acres, being No. 12 on the said map." A meeting was held by the commissioner on the 31st of October, 1839, at which *Wedge* attended, and the map and terrier were exhibited, and likewise a plan shewing the allotments and exchanges, the particulars of which were explained to *Wedge*, and he, as agent to the Duke, approved of the same. The several parties interested in these exchanges



intent and meaning of the act of Parliament, and was not such a consent as was required by the act, but was absolutely null and void; and that in case the said writing was in any way effectual when signed by him, he revoked, determined, annulled, and made void the same, and he thereby required the commissioner to desist from all further proceedings in the matter."

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An action of trespass was shortly afterwards brought in the Court of Common Pleas, by the Duke of *Beaufort* against Mr. *Neeld*, for the trespass committed by the latter, in having entered upon and exercised acts of ownership in Dunley Gorse; but the defendant having pleaded specially in defence of his entrance on the *locus in quo*, the proceedings in trespass were abandoned. An action of ejectment was then (June 5, 1840), brought to recover possession of the said close, and the demises declared on were those of the Duke, and of Earl *Granville* and Lord *Fitzroy J. H. Somerset*, who were devisees in trust of the late Duke for a term of 1000 years, with remainder to the present Duke for life (a). In that case a verdict was taken for the plaintiff, but leave was reserved for the defendant to move to enter a nonsuit. A rule was accordingly obtained, and was (June 5, 1841), after argument, discharged, on the ground that no award nor any exchanges had been made so as to pass the legal title in the lands to Mr. *Neeld*. The Duke was allowed to sue out and execute a writ of possession under this judgment.

On the 9th June, 1840, Mr. *Neeld* filed his bill against the Duke of *Beaufort*, Lord *F. J. H. Somerset*, Earl *Granville*, and two other persons, setting forth all the above facts, (except those relating to the progress of the two actions,) and praying that the Duke might be restrained

(a) See *Doe, d. Henry Duke of Beaufort and others v. Neeld*, 3 N. R. 618; and 10 Law Journ. (N. S.), C. P. 267. Man. & Gr. 271, 294, n.; 3 Scott,

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from further prosecuting either of them, and from committing waste on the premises, and that it might be declared that the Duke, Earl *Granville*, and Lord *F. J. H. Somerset*, were bound by the exchange of lands between Mr. *Neeld* and the Duke, directed by the commissioner, and that the same should be carried into effect, and the Duke and all other necessary parties should be decreed to do and execute all necessary acts and assurances for giving effect to such exchange.

An injunction, as prayed by the bill, was obtained on the 21st of July, 1840; but, after a full answer had been put in by the Duke, denying Mr. *Neeld's* equity, this injunction was dissolved by an order of the Vice-Chancellor, on the 26th January, 1841.

Mr. *Neeld* appealed against this order to the Lord Chancellor.

The action of ejectment was then proceeded with, and judgment obtained by the Duke on the grounds already stated.

On the 15th of December, 1840, the Duke of *Beaufort* filed his bill in Chancery against Mr. *Neeld*, Mr. *Tayler*, and certain other owners of land in Littleton Drew, and also against the persons who had been defendants in Mr. *Neeld's* suit, setting out the same facts as had been stated in Mr. *Neeld's* bill, and also adding allegations to the following effect :—In December, 1838, the Duke was staying at Bad-

change for it. *Wedge* communicated this to *Little*, the agent of Mr. *Neeld*, and about the same time informed the commissioner, or stated in his presence and hearing, at some meeting under the act (*b*), that the Duke would not part with any woodland unless he could get woodland for it. At a meeting held in January, 1839, *Little* stated that Mr. *Neeld* had no power to part with Alderton Grove without the consent of the trustees of his wife, from whom he was not disposed to ask any favour. This statement was communicated by *Wedge* to the Duke, who then considered the proposal of Mr. *Neeld* for an exchange of Dunley Gorse at an end, and had no further communication with *Wedge* on the subject. The consent, as prepared by the commissioner, was sent by *Wedge* to the Duke's solicitors, and was (as the Duke in his bill alleged) signed by him on the 1st June, 1839, "in the belief and reliance, and on the supposition, that it authorised merely the exchange of the arable and pasture lands, and he did not pay attention to the contents thereof, nor inspect nor see the map therein referred to, nor inquire concerning the numbers or figures therein mentioned." The figures in the sketch on silver paper were not the same as those on a map of his estate, possessed by the Duke, where Dunley Gorse was not marked 12, but 24, and neither Dunley Gorse, nor any other parcel of land therein referred to, was mentioned by name; and the Duke would have refused to sign it had he believed that it did or would include Dunley Gorse; and he would have rejected any plan that proposed to exchange that woodland for any other than woodland. The Duke never heard of this exchange of Dunley Gorse till the 30th January, 1840, when he happened to ride through it, and found to his surprise the labourers of Mr. *Neeld* at work, on which

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(*b*) The commissioner denied to him in such a manner as to
 in positive terms that this com- call his attention to it. If made in
 munication had ever been made his presence, he had not heard it.

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he immediately objected to the exchange, as made without his knowledge, authority, or consent. The bill then referred to the correspondence which had taken place between the parties to the actions which had been brought, and one of which (the action of ejectment) was then pending, and prayed that the Duke might be declared not bound in law or equity by the document of the 1st June, 1839, that the same might be delivered up to be cancelled, that the commissioner might be restrained from making any award which should include Dunley Gorse, and that *Neeld* might be restrained from committing waste therein. Answers were put in by the defendants to this bill.

On the 27th January, 1841, a motion was made before the Vice-Chancellor of England, who, by an order of that date, granted the injunction prayed by the bill.

Mr. *Neeld* likewise appealed against this order.

The two appeals came on to be heard together before Lord Chancellor *Cottenham*, who, the 3d of August, 1841, discharged both orders, with costs. This was an appeal against his Lordship's decision.

The case was twice argued; in 1844 and again in 1845; on the first occasion by the Solicitor-General (*Sir W. Follett*) and Mr. *Loftus Lowndes*—Mr. *Campbell* being with them—for the appellant, and by Mr. *Bethell* and Mr. *J. B. Parry* for the respondents; and on the second occasion by Mr. *Turner* (Mr. *Campbell* was with him) for the ap-

But suppose the consent to have been valid, then it is submitted that, as the commissioner and the agent exceeded in its execution the power given to the latter by his principal, performance of what has been agreed to by him, cannot be enforced. The power was to exchange lands with other proprietors; the agent has agreed to exchange, and the commissioner has exchanged lands with those who were not proprietors of the lands to be received in return, but were only expected to become so through a previous exchange made under the authority of this very award. The commissioner has also exchanged lands of a sort and for a sort not warranted by the power given him by his principal. In this state of things it is matter of course for a Court of Equity to restrain the carrying into effect acts thus done without proper authority. If that was not so, the party injured might be wholly without remedy; *Speer v. Cawter & Taylor* (d). Lord *Eldon* there held that the commissioner might be restrained from proceeding to execute his award. "The first consideration in this case is (his Lordship says) (e) what are the remedies at law against commissioners acting in execution of a public duty imposed on them by an act of inclosure; and, according to my view of the subject, commissioners not acting in the mode and form directed by the act of Parliament would be liable to the interposition of Courts both of law and equity, unless the act contains a clause protecting them against such interposition." The Court of Queen's Bench would compel them to do what they ought, and equity would interfere to prevent them from doing what they are not entitled to do. Equity would especially interfere under an act of this kind to prevent them from completing a sale to a person who was not himself a proprietor of land on the spot affected by the act, *Hawes v. James* (f). The more recent case of *Frewin v. Lewis* (g), which oc-

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(d) 17 Ves. 216.

(f) 1 Wils. Ch. Cas. 2.

(e) Page 224.

(g) 4 Myl. & Cr. 249.

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curred before Lord *Cottenham*, is to the same effect. His Lordship there, when speaking of the jurisdiction of the Court of Chancery, in a case like the present, said (A)—“in the instance of railway companies, canal companies, and other bodies, incorporated by acts of Parliament, while the Court avoids interfering with that which they do while keeping within the limits of their jurisdiction, it takes care to confine them within those limits; and if, under pretence of an authority which the law does give them to a certain extent, they go beyond the line of their authority, and infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this Court by injunction.” So that, assuming the commissioner here to have exceeded his jurisdiction, it is perfectly clear that this was a case for an injunction to restrain him from carrying his award into effect.

The only remaining question then is, whether there is any contrary equity which should prevent the Court from interfering in favour of this appellant. The first ground taken by the respondents as an answer to the demand for an injunction, is founded on the act of Parliament which gives an appeal from the decision of the Commissioners to the Quarter Sessions. [*The Lord Chancellor*.—That would not of itself prevent a Court of Equity from interfering.] It would not; the same circum-

counts with the appellant, but he has no general authority to take or discharge a tenant, and certainly none to consent to the exchange of lands. This is distinctly sworn to, both by the Duke and Mr. *Wedge*. The case of *Whitehead v. Tuckett* (i), which was cited in the judgment in the Court below, is, therefore, inapplicable to the present; for there the authority of the agent did, in fact, exist, and was a valid authority with reference to the subject-matter with which he was dealing. To apply that case to cases like the present will put every man at the mercy of his land steward, and it cannot therefore be so applied. But it will be said that after the 1st of June there was a contract which the appellant had bound himself to ratify. But the paper which contains the undertaking to ratify does not, it is submitted, constitute a contract between the parties. In the first place, that paper must be looked at with reference to the powers of the commissioner, and must be understood as an undertaking to ratify whatever the commissioner did under the act. Now the act only gives the commissioner the power to exchange lands upon the consent of the proprietor of them, and therefore the question again comes round to the point whether that consent was, in this case, validly given. The contract, if any, is to ratify the exchange of such lands as he should fix by his award. Till the award fixes the land, the contract is only executory. [*The Lord Chancellor*.—I agree with *A. B.* to sell my land for such price as you shall fix. Can I revoke my agreement before the price has been fixed?] Certainly; *Milnes v. Gery* (j) is an authority to that effect. That was an agreement for a sale according to a valuation to be made by two persons. The Court was asked to appoint two persons to make the valuation, but dismissed the bill, and did so because there was no contract of the sale till the price was fixed. [*The Lord Chancellor*.—No valuation was made there, and the very object of the bill was to

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(i) 15 East, 400.

(j) 14 Ves. 400. See p. 406.

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change the contract by substituting the Court for the party who ought to have made the valuation.] The arbitrators had been named, but they differed, and the Court would not name an umpire. [*The Lord Chancellor*.—Suppose the party had revoked, but the arbitrator had, notwithstanding, fixed the price.] His authority would have been gone. There might be a remedy against the party by an action for damages, but there could not be a bill for a specific performance. There can be no perfect contract till the subject-matter is fixed. And this is especially the case where the party to be bound has been deceived. The appellant was deceived here. He did not know that this property was comprised in the proposed exchange. It may be true that the agent knew it, but then he had a restricted authority which bound him not to exchange Dunley Gorse, except on the terms of wood for wood. The appellant signed the supposed contract in mistake, and it is a principle of equity that a mistake will vitiate a contract; and that, under such circumstances, the suffering party shall be relieved. Equity, indeed, has gone much further, and not only refused to enforce a contract, but has undone such contracts even after they have been perfected. [*Lord Brougham*.—But equity has not relieved against gross improvidence.—*Lord Campbell*.—Are not these the questions which you would argue at the hearing of the case?] They are, and that is the

The cases that sustain the right of the appellant to relief in this case are very numerous. *Calverley v. Williams* (k) is the first that may be cited. In that case the rule was laid down that if one party *bonâ fide* thought he had purchased part of an estate, which the other *bonâ fide* thought he had not sold, it was a ground to set aside the contract. *Hitchcock v. Geddings* (l) is to the same effect. In *Bingham v. Bingham* (m), *Henkle v. The Royal Exchange Assurance Company* (n), *Stockdale v. The South Sea Company* (o), and a case of *D'Oliffe* or *D'Oliphant* referred to in the case of *Barstow v. Kilvington* (p), the same doctrine was held. In the last named case, the Attorney General, referring to a decision of Lord *Thurlow*, said, that his Lordship (q) "laid down the rule with great latitude that if a mistake appears, it is as much to be rectified as a fraud;" and he afterwards added "the true ground of all the cases is, that if the fact of mistake is distinctly proved by unquestionable evidence, the Court will rectify the settlement according to the intention," an argument which the Court adopted. In *Farwell v. Coker*, which is mentioned in *Cholmondeley v. Clinton* (r), issues were granted to try whether a party who executes a release of a reversion knew, or was apprised of her title to the reversion, and whether she intended to repass it by the release.

This case must, however, be considered in a view still more strongly in favour of the appellant than that which has hitherto been presented to the notice of the House. This is not the case of an ordinary vendor and purchaser, for the appellant is tenant for life, subject to the discretion of trustees, whether they will or not take this life estate for the benefit of his wife and children. He is indeed vested with parliamentary power to sell or exchange these

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(k) 1 Ves., jun. 210.

(l) 4 Price, 135.

(m) 1 Ves., sen. 126.

(n) *Id.* 317.

(o) 2 Atk. 141.

(p) 5 Ves. 593, 601.

(q) *Id.* 595, and 601.

(r) 2 Mer. 353; see also *Brooke v. Inskip*, *Id.* 355., & 8 Ves. 417.

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lands, but that power to be well executed must be exercised for the benefit of all interested. Under these circumstances the case is like that of trustees who enter into an improper contract to sell, where the Court will not enforce performance; *Ord v. Noel* (s). The principle applicable to such a case is to be found in *Mortlock v. Buller* (t), in which it was held that "the Court is not bound to decree specific performance in every case where it will not set aside the contract, nor to set aside every contract that it will not direct to be specifically performed;" that, in fact, specific performance is wholly discretionary in a Court of Equity, as is also the jurisdiction to set aside a contract. The party there was left to his remedy at law. That case was incidentally referred to by Lord *Eldon*, in the case of *Merediths v. Saunders* (u), and his Lordship said that if he had again to decide it, he should decide it in exactly the same way as before.

The act under which these exchanges were to be made renders the award final and conclusive evidence that the provisions of the act have all respectively been complied with, and that all necessary consents have been given, and no other evidence is to be necessary to establish the title to the lands. Here some portions of the land were to go to the church from which the appellant never could reclaim them; but independently of that, the effect of the award would be to create an absolute and unimpeach-

It will not now be contested that a Court of Equity may restrain the party in possession from committing waste ; for it is a principle of equity to preserve uninjured, *pendente lite*, property, the title to which is in dispute.

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For the respondents, it was argued to this effect :—

The question here is whether the appellant has a personal equity to be exempted from performing this agreement as an agreement made in mistake. The circumstances of the case, much more than the authorities referred to, must decide that question ; and it was on the circumstances existing here that the decision in the Court below was founded. The principle of equity is clear, but the facts here are not such as to bring the appellant within its operation. On the contrary, his consent and authority, and his perfect knowledge or means of knowledge, are undoubted ; and if he has been in error, it has been entirely through his own improvidence and neglect. The respondents are not answerable for these, and the rules of Courts of Equity as to rectifying mistakes cannot be relied on in support of what the appellant now demands.

What were the appellant's means of knowledge ? There was at Badminton an old map which described the property ; but Mr. *Wedge* was furnished with another, copied from one made for the purposes of the Tithe Commissioners, on which was drawn out a sketch of the plan and of the whole of the property intended to be exchanged. This was a map copied on silver paper, marked with colours, and laid before the appellant on the occasion of his signing the consent, which was the authority to *Wedge* to act. That the appellant understood it, is plain from one of his letters, in which he says “ the effect of this will be that it will be necessary to give up ” (and he mentions several places) “ and Dunley Gorse.” That was not then referred to as property only to be given up for some particular field, or as wood for wood, but as part of what was to be given up for the general purposes of the inclosure.

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This sketch was again and again referred to. [The learned counsel went in this manner through a detail of the facts of the case, and contended that at the time of signing the consent, the plaintiff was fully acquainted with all of them.] The first point made for the appellant was that in one of the maps Dunley Gorse was marked as No. 12, in another as No. 24; but the answer to that is, that in the consent it was designated by both numbers; for the numbers 12 and 24 there mentioned, really referred to but one piece of land. The appellant had all the means of knowledge, and gave the authority and the ratification after he possessed them. He cannot set up any equity to be released from his consent, on the ground that though he had the full means of knowledge, he did not use them. He might have used them, and not having done so, he cannot on that account alone allege that his agent acted on an authority which he had given in mistake.

[*The Lord Chancellor.*—Here the agent was the agent for all the general purposes of the exchange; he was not authorised to give an express and final consent; but that seems to have been given by the appellant himself by his own signature.]

The cases referred to on the other side may be relied on for the respondents; for they shew distinctly that if the mistake arose from the negligence of a party, he could not on

a description must be bound by that description, whether he is cognizant of it or not." If the principle there stated is applied to the circumstances of this case, there is an end of the appellant's argument. He has signed a consent to exchange certain pieces of land, part of his own estate, and cannot now be heard to say that he was not aware that one particular portion of his estate, which, according to his own account, had been the subject of his consideration, was not included in that consent.

Assuming the form of the consent to have been insufficient of itself to pass the legal estate, as it is said to have been considered in the Court of Common Pleas (*w*), still there is a great difference between insufficiency and invalidity. All that the Court of Common Pleas said was that the consent was insufficient to pass the legal estate; that the parties on all sides intending to execute a valid exchange made a mistake in the form of proceeding, and did not do enough to effect their purpose; and that the legal estate could not pass till the award had been actually made. That alone will not sustain the application for the interference of equity by way of injunction to prevent the making of that award. Besides, the 53d section of the act shews there is nothing in the case different from that of *The Attorney General v. The Mayor of Liverpool* (*x*), where it was decided that the Court of Chancery will not grant an injunction to restrain parties from proceeding to deal with property, merely because their title may depend on the construction of a doubtful statute, if the granting of the injunction would for ever deprive them of the exercise of a right, especially if no irreparable mischief is to be apprehended from allowing them to proceed. Here no mischief whatever can follow from allowing the parties to

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(*w*) *Doe, d. Beaufort v. Neeld*, 3 Man. & Gr. 271; 3 Scott, N. R. 618; 10 Law Journ., N. S., C. P. 267.

(*x*) 1 Myl. & Cr. 171.

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proceed, nor can any rights be obtained and exercised except under lawful authority.

By dissolving the injunction, the Court permitted the commissioner to make his award. It is said that that will prevent the question between the parties from being fairly tried. But the 53d section of the act allows an appeal to the Quarter Sessions against any thing done under the authority of the act, within six months after the cause of complaint shall have arisen. In this case, as in the *Liverpool case*, it is the continuing of the injunction that will prevent the questions, whatever they are that may exist in this case, from being fairly tried.

The circumstances of this case furnish in every respect an answer to the appellant's claim. In the first place the mistake, if any, is entirely owing to his own negligence; in the next, possession of the exchanged premises has been delivered, and there is no reason whatever for imputing that such possession has been fraudulently acquired. As to the effect of the delivery of possession, the result of all the authorities is thus stated in the work of the present Lord Chancellor of Ireland (y): "If possession be delivered to the purchaser, the agreement will be considered as in part executed, especially if he expend money in building or improving according to the agreement." Such is the state of things here. The person whose land has been exchanged for Dunley Gorse is in

Mr. *Turner*, in reply.—The commissioner has exceeded his authority, and has directed pieces of land to be given up by persons who are actually not in possession of them, in satisfaction of those taken from the appellant. This alone is a good ground of interference by a Court of Equity. The ignorance of the Duke here did not arise from that negligence which disregarded the rules of ordinary business, but from the fact that he had expressly declared he would not exchange wood except for wood; that this declaration had been communicated to the commissioner and to Mr. *Neeld's* agent; and that the latter had announced Mr. *Neeld's* incapacity to comply with this condition. Under these circumstances, it was perfectly natural and reasonable for the Duke to think that that part of the proposed arrangement was at an end; and an allotment made in defiance of this communication cannot be sustained. At all events, there was a good question for a Court of Equity to consider, and the injunction ought not to have been dissolved.

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[In the course of the argument, the appellant's counsel began to read the commissioner's minutes of his proceedings.

The respondents' counsel objected to the reading of these minutes, not as being inadmissible as evidence, but because they had not been referred to in the Court below, nor printed in the papers prepared for this House. The standing order, No. 181 (z), was relied on.

Lord *Brougham*.—We daily hear documents read that are not printed. It would be impossible to adhere to that order in its terms, without putting parties to very heavy, and sometimes very needless expence.

The minutes were permitted to be read.]

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The Lord Chancellor.—In moving the judgment of your Lordships in this case, it is right that I should mention that, in consequence of some accidental circumstances attending the first argument of the case, your Lordships directed that it should be argued a second time by one counsel on a side. And I think I may state to your Lordships that, in the second argument it has been fully, ably, and perfectly sifted and discussed; and your Lordships are now in a condition to pronounce a satisfactory judgment upon the facts of the case.

The facts at first view appear to be complicated; but when you come to look at them in detail, and to consider them as far as they apply to the present question, they resolve themselves into a very narrow compass. I will state them, as far as I think it is necessary to make a statement, for the purpose of raising the question which you are called upon to decide.

The proprietors of land in the parish of Littleton Drew (in which the present appellant, the *Duke of Beaufort*, owns a considerable property, and Mr. *Neeld*, the respondent, is also a proprietor,) were desirous of having an enclosure; and a meeting took place for the purpose in the month of May, in the year 1838.

The proper number of proprietors agreed upon the enclosure; they attended the meeting either in person or by their agents. Mr. *Francis Wedge*, who was the land

missioner. At that meeting Mr. *Francis Wedge* attended as the agent of the Duke, the appellant, and Mr. *Little* attended on the part of Mr. *Neeld*, and Mr. *William Tayler* was, I believe, unanimously elected as the sole commissioner for the purpose of conducting the enclosure.

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Upon the 10th and the 31st of January in the following year, meetings were held for the purpose of making arrangements, with respect to the exchange of old enclosures. At those meetings Mr. *Wedge* attended on the part of the appellant, and consented on his part that certain old enclosures, which were designated by particular numbers, and one of which included the subject in contest, namely, *Dunley Gorse*, should be given up to the commissioner in order that he might apply to them the power which he had of authorising exchanges of them for other enclosures, which he might think suitable for the interests of the *Duke of Beaufort*.

The commissioner stated that it was necessary that there should be a written consent, and that that written consent should be signed by the respective proprietors. Accordingly, the consent was drawn up in these terms.—[His Lordship read it; see *ante*, p. 251]—This paper, after it was drawn up, was delivered by the commissioner, or by his clerk, to Mr. *Wedge*, the agent; it was transmitted by Mr. *Wedge* to the solicitors of the appellant in town; it was by them laid before the appellant, and he signed the paper. It was afterwards returned to the agent in the country, and delivered by him to the commissioner, who, in the discharge of his duty, proceeded to make out two schedules, exchanging the lands in question for other lands, some of which belonged to Mr. *Neeld*.

This was completed in the month of July; and in the month of September, about Michaelmas in that year, the parties were put in possession of their respective allotments. The lands of the appellant, which were to be taken

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in exchange, were delivered to Mr. *Neeld*, and Mr. *Neeld*'s lands were taken possession of by Mr. *Wedge*, the agent of the appellant.

Thus the matter rested for a considerable time. Mr. *Neeld* commenced improvements in the close called Dunley Gorse. The whole proceedings took place with the knowledge of the agent, Mr. *Wedge*. He knew what exchanges had been made; he consented to the parties taking possession; and after Mr. *Neeld* had taken possession of the close in question, an application was made on his behalf to Mr. *Wedge*, the agent of the appellant, requiring that he might, though the valuation of the underwood had not then been completed, be allowed to cut it down for the purpose of carrying on the improvements which he contemplated. To this Mr. *Francis Wedge*, on the part of the Duke, assented, and the proceeding went on in this way until the month of February in the following year, when the Duke, being down at Badminton, accidentally riding in the direction of this property, found some workmen cutting down the trees, or exercising some acts of ownership within Dunley Gorse. He immediately objected to this, and said it had never been done by his authority. That has given rise to the present question.

Now these are the facts of the case as stated on the part of the respondent. The case of the appellant is of this

use of settling the difference; but he said the exchange must be wood for wood. Those were the directions which he gave to his agent.

In the course of one of those meetings to which I have referred, Mr. *Wedge* mentioned to the agent of Mr. *Neeld* that the Duke wished to have Alderton Grove in exchange for Dunley Gorse. The reply was this—"Mr. *Neeld* cannot do that, because Alderton Grove is included in his marriage settlement, and he cannot apply to the trustees to give their consent, because he is at variance with them." This was communicated by Mr. *Wedge* to the Duke. The Duke did not upon that representation recede from the directions which he had given with respect to Dunley Gorse, namely, that he must have wood for wood. There the matter terminated. No further communications or conversation took place between Mr. *Wedge*, the agent, and the Duke upon the subject, until after the period which I have mentioned—namely, in the month of February, 1840, when the Duke, for the first time, discovered what had been done.

It is said by Mr. *Wedge*, in his evidence, that he communicated to the commissioner the instructions which he had received from the Duke, with respect to the exchange of wood for wood, and this is a material part of the case, and deserves attentive consideration. The commissioner, in direct terms, denies that any such communication was made to him. Mr. *Wedge* says—"I stated it to the commissioner, or in his hearing." The commissioner states that it was never mentioned to him; that it was never mentioned in his hearing, or at least in such a way as to engage his attention; and he says, in confirmation of this, "If it had been mentioned to me, I should have required Mr. *Wedge* to point out what wood he required in exchange, because it was difficult to find what wood was in contemplation." But Mr. *Wedge*'s evidence is not only directly denied, in the manner which I have stated, by the commissioner, but

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I think there are circumstances in the case which shew clearly that Mr. *Wedge* must be mistaken in the evidence which he has given.

In the first place, if this was communicated to the commissioner as the condition of the exchange, it is probable that some memorandum would have been made upon the subject in the consent paper which was sent to the Duke for signature. But the fact which appears to me to be decisive is this, that if such instructions had been given to the commissioner by Mr. *Wedge*, the agent of the Duke, when he found that the schedules were all made out, and that no notice was taken of this condition, which he considered to be an important condition, he would immediately have remonstrated, as a matter of course, to the commissioner—saying, “You have departed from the instructions you have received,” and he would probably have made some communications to the Duke, or to the Duke’s solicitor, upon the subject. But nothing of that kind took place; on the contrary, he acquiesced immediately in possession being taken, and never at any time made any complaint upon the subject until afterwards, when his attention was drawn to it upon the occasion to which I have before referred—namely, in the month of February in the following year.

I am bound, therefore, to come to this conclusion, that Mr. *Wedge* is mistaken in the evidence which he has given.

Gorse was included in it, because the closes were set out, not by name, but by numbers, and those numbers referred to a map that was not at the time in the possession of the Duke. But I think it was the Duke's business to have made inquiry; he ought to have inquired of Mr. *Watkins*, his solicitor, if he wished to ascertain the fact; he ought to have made inquiry as to what those numbers meant, and what the lands were which were intended to be given in exchange; or, if Mr. *Watkins* was not in a condition to inform him, which probably he was not, he might have made inquiry of Mr. *Wedge*, his agent in the country. A delay of a day or two might have been occasioned by making these inquiries; but if he did not choose to make them—if he did not choose to exercise due caution in that respect—he cannot turn round and say, “I really did not know the contents of the paper when I signed it. I signed it incautiously.” He cannot now with propriety say that, so as to free himself from the effects and consequences of his own act.

These are the leading facts of the case, as far as it appears to me necessary to state them, for the purpose of raising the present question, and it comes to this: there is an agent, appointed by the Duke, for the purpose of transacting all the business of the inclosure, except so far as relates to those instruments, which the proprietors must themselves sign, in order to give them validity. The agent has a general authority to conduct the business of the inclosure, to attend the meetings, and to represent the Duke upon those occasions. The Duke gives him particular instructions, limiting his authority as to one part of the business—a small part of the business; but he does not communicate those limits to his authority or his instructions either to the commissioner or to the other party. I have already made a few observations upon the evidence, for the purpose of shewing that no such communication was made; if that is so, and the agent has acted

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inconsistently with the instructions which he received in that particular, being a general agent for the purposes of the inclosure, I consider, so far as his acts go, that they are binding upon the Duke.

Then when we come to the ratification, what is the effect of the ratification? If the Duke does not choose to make inquiry—if he does not choose to exercise ordinary caution, but puts his signature to the instrument, giving authority to the commissioner to proceed in his name and act upon his interests; and if the commissioner acts upon that authority, and other parties deal with the commissioner, and the exchanges go on and are completed—it appears to me rather a strong proposition to say, that the Duke is not bound by the act of the commissioner, that act being founded upon his written consent, under the circumstances which I have stated. If the agent in this one particular has acted inconsistently with the instructions which he has received, who is the party that is to suffer? The party who is dealing with the appellant, or the appellant, whose agent that individual is? Undoubtedly the appellant. If the Duke himself has incautiously signed the instrument to which I have referred, is the party dealing with the Duke to suffer? or the Duke, who has himself compromised his own interest by his incautious proceedings? Undoubtedly the Duke.

sioner to the schedule did not convey the legal estate ; that is all that has been decided by the Court of Common Pleas. In the first argument great reliance was placed upon that decision. It has no bearing upon the present question ; if the consent, in the present instance, is binding upon the Duke, the consequence would be, that a Court of Equity would compel him to execute the necessary instruments for the purpose of giving legal effect to that consent ; and this view of the case was in reality taken by one of the learned Judges in the Court of Common Pleas—I mean Mr. Justice *Maule*—who, in giving his opinion, towards the close of it, expressed himself almost in the same terms in which I am now stating this case to your Lordships.

The question then will be, what is the effect of this upon the present appeal upon the orders as to the two injunctions ? As far as relates to the injunction obtained by Mr. *Neeld*, I make no observation ;—I mean the injunction by which the proceedings at law were stayed, and I make no observation on it, because the counsel for the appellant distinctly and in terms admitted that that injunction ought to be continued. The only question, therefore, which remains to be considered is the other injunction, by which the appellant seeks to prevent the commissioner from proceeding with his award. In the first place it was stated that if the commissioner should proceed with his award, the appellant fears that he may suffer irreparable injury ; for the award when made, is, by the 3 & 4 Vict., c. 31, final and conclusive, to shew that the provisions of the statute have been complied with ; so that though at the hearing of the cause the Court should come to a conclusion different from that which this House now entertains, the consent will be taken to be binding, after the award is made, according to the terms of the act of Parliament. That was an argument which was much pressed upon us. But the argument does not apply in point of fact, because

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an appeal to the Quarter Sessions lies against the award, and an appeal lies also with respect to the consents. By the act of Parliament consents are not conclusive, the award is only conclusive evidence that consents have been given, but they may be investigated and examined upon an appeal against the award. That argument, therefore, appears to me to fall to the ground.

But then it is said that this injunction ought to be continued until the hearing of the cause, because the Court may take a different view of the case upon the hearing, when the whole evidence in the cause is before it. Now, the observation which I make in answer to that argument is of this nature. There appears to me to be no dispute about the facts of the case. When I say no dispute and no controversy, I mean that the dispute and controversy are of such a nature as to satisfy me that there is no doubt respecting the facts. All the main facts are admitted either in the affidavits or in the answer, and they lead me to the result which I have stated. If that be so, then the sole question to be considered upon the hearing will, in substance, be this—What is the operation of this consent in point of law? It is a mere question of law, and I cannot anticipate that, upon the hearing of the cause, a different conclusion will be drawn by the Court as to the question of law from that which your Lordships are dis-

ficient to give this case a very considerable degree of importance. By the two discussions that have taken place on this appeal, very ample opportunity has been given for the fullest consideration of all the merits of this case. Upon them, therefore, we have now to decide. I begin by saying, that whatever miscarriage may at one period of the argument appear to have existed, in respect of the point decided in the Court of Common Pleas, and whatever difference we might have with the Court below upon the point so decided, this case does not bring into controversy at all the merits of the decision of the learned Judges in the Court of Common Pleas. If we differ from the Vice Chancellor, and agree with the Lord Chancellor in the judgment given in the Court below, we say nothing by so agreeing in the slightest degree impeaching the judgment of the Court of Common Pleas; for it appears to me to rest entirely upon sound grounds, and I wholly go along with it, as, I believe, does my noble and learned friend who last addressed your Lordships. Upon that, therefore, there is no doubt. But now comes the question as to the right conferred by this exchange under the powers of the act of Parliament: now comes the question with respect to the strict right of Mr. *Neeld* as against the Duke. And two matters are here to be attended to, not principally, I will say, but solely. The first is the authority under which Mr. *Wedge* acted upon the part of the Duke in the course of this transaction. The manner in which that authority wherewith he was clothed was generally given, the degree to which that authority was limited by his employer, the Duke, the extent to which any limitation affixed to that authority was communicated either to the commissioner or the other party, or to both; all these matters form the first branch of this case, and to these matters, therefore, it is important first to direct our attention. But they do not, in my view, at all constitute the whole of the

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case, and I shall presently have occasion to remark, how far I should be disposed to stop short of that decision below, if the whole of the case rested there. Before coming, therefore, even to enunciate the second proposition, I apply myself to the first. Now it appears indisputable—for it is a matter on which the answers and the affidavits on both sides agree—that Mr. *Wedge* was generally in the service of the Duke, that that was his employment and his livelihood. Secondly, it appears that he was employed as the agent of the Duke in respect of the exchange, the particular operation in question; and thirdly, that as such agent he acted on the part of the Duke, and was clothed and appeared to be clothed, and was held out by his employer as being clothed, with a general authority to represent him in this transaction. All this is clear, and upon this we have no doubt, and there is no controversy.

But now we come to the more debateable part of the case, which was as to the instructions given by the Duke to Mr. *Wedge*, and how far those instructions were secret or were patent and disclosed. It is not denied on the other side that the Duke's assertion is well grounded, to the effect of his having limited Mr. *Wedge* by particular instructions that he would have "wood for wood." He did not object to exchanging Dunley Gorse, but he objected to exchanging it unless that which was the matter to be ex-

Now comes the question, however, and the material question, how far this limitation of *Wedge's* authority was kept concealed between the Duke and Mr. *Wedge*—I do not mean intentionally—concealed or kept secret with any design of deception—but how far it was, in point of fact, disclosed, or how far it was, in point of fact, kept undisclosed. First, *Francis Wedge* says he told it, or meant to tell it, to the commissioner, but the commissioner positively and distinctly denies that any such communication was made to him. When you see two parties conflicting together in their account of the same matter, you naturally inquire first of all who the two parties are, and which is most likely to be mistaken; you next inquire how this particular conflict and controversy of statement arises, and then you may perchance find that the two which are apparently in conflict are somewhat reconcileable, and that is always a more agreeable and more safe conclusion to come to than to attribute falsehood to either party.

Now the two parties here are *Francis Wedge*, the agent of the Duke, who, without any impeachment of his respectability, must be admitted to be in a peculiarly delicate situation, for he is in the situation of being the person who from beginning to end has been the cause of the difficulties which have occurred to his employer, it being undeniable that if *Francis Wedge* got his instructions, if he was distinctly aware that Dunley Gorse was only to be exchanged for wood, it was a fault, a negligence, an oversight of him, *Francis Wedge*, that he did not take care to leave no doubt upon this question in the minds of others. Now that always gives a leaning to men, even to honest and correct men—it attracts always a sort of feeling, it lends a colour to the evidence which a man gives, when, by means of his own statement, he vindicates himself, and escapes from a censure—the censure generally a complaint on the part of his employer. That is the first observation which I make, and that, therefore, is in favour of the

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account given by the commissioner who laboured under no such bias, and who was not likely to give any such colour to his account.

But the second observation which I make, and which I have already adverted to, refers to the nature of the supposed contradiction between the parties, and I do not, any more than my noble and learned friend has done, find that there is any such complete contradiction. If Mr. *Francis Wedge* had said distinctly and articulately—"I swear that I told the commissioner so and so, that I was limited to wood for wood," and the commissioner had said "I swear that Mr. *Francis Wedge* never told me that he was limited to wood for wood by his instructions," it would have been a much more difficult thing to deal with the contradiction. But I do not find that—that is what Mr. *Francis Wedge* says,—he says "I swear that I said it to the commissioner, or in his hearing." Now that may very easily be answered by the other party, and the effects of it defeated without any direct contradiction occurring, for the other party may very easily say—"I never heard any thing of the kind," and both may be equally correct in their swearing, both may be equally correct in regard to the honesty of their depositions, and both may be equally correct in regard to the accuracy of their recollection, because it may be perfectly true that Mr. *Francis Wedge*

up and told it to the commissioner; he ought to have taken care that the commissioner had a distinct knowledge of a restriction so important; he ought to have taken care, in my opinion, so to put it in writing as that the commissioner should have been in possession of the *constat* of the instructions, and that it should not rest on parol at all: *Litera scripta manet*; he ought to have left it in writing. That is the result of the observations one makes upon the depositions as to this apparent conflict of evidence upon the question of fact; for it is not a real conflict, and that is the conclusion to which one comes as to the conduct of Mr. *Wedge* in this particular. Had he pursued a different course in this matter, there would not have been any doubt upon the matter; and this question could not have arisen. He has not done so; and the result of his not doing so is, that this dispute has occurred, and that we have now to adjudicate upon it.

Such, therefore, being my opinion upon the first point, namely, that Mr. *Wedge* being clothed with a general authority, limited by a private instruction, that instruction not being conveyed either to the commissioner or to the other party, the question is, what results from this in respect to the exchanges for which he is acting upon instructions so restricted, and thus left uncommunicated. If the whole case had rested here, I should not have been prepared to give a clear opinion in favour of the decree below, which rests upon the validity of this transaction, that is to say, either its validity in itself (for upon this point I entirely agree with my noble and learned friend), or at all events such validity as might have been given to it in equity, from the conduct in point of law which had been held by the parties. It is not necessary for me to consider what would have been the result, if these transactions had rested here and gone no further. I am not going to discuss whether it is possible, though I have a very strong opinion that it is not pos-

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sible for an agent to sell a man's estate, or to sell his lands, where there is no authority given to him to do so ; but that is not the case here. It does not rest upon Mr. *Wedge's* proceedings, or upon his authority, whether general or restricted ; but it rests upon the authority of the Duke himself interposed in the transaction, which is the second point in the cause, and which I am now going to advert to.

The Duke knew that Mr. *Wedge* was acting as his agent : the Duke knew that he had clothed that person with a general authority to represent him in this negotiation : the Duke knew, no doubt, that he had tied up *Wedge's* hands by a particular instruction, and *Wedge* ought to have taken care that that instruction was communicated to those before whom he appeared clothed with a general authority, which instruction not being communicated, would leave him clothed with an absolute authority. But be that as it may, it does not rest there, because the Duke communicated, through Mr. *Wedge*, to the other party, or the commissioner, I care not which, a paper containing a statement of the exchange, which paper being signed by him would convey that authority, not by implication, not through his agent, and not by facts and circumstances, but by direct authority from himself, and under his own hand.

Now, either the contents of that paper may have been



being held to have looked ; and if he either shuts his eyes, or carelessly sees, he shall not be allowed in a Court of Law or Equity to say, "It is a mistake—I never knew it," because he might have known it, and he ought to have known it ; and if he signs his name, and could have looked, and did not look, still he is bound by his act.

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Therefore, I do not see how it is possible that we can absolve the Duke from the legal and equitable effects of having signed his name to that instrument, and how we can allow him, after he has signed his name, to say that his agent was exchanging land without his authority ; for it was not his agent who was exchanging the lands without his authority, it was he that was ratifying the exchange, and till he examined and saw what he was about, he ought not to have signed or ratified ; but as he has done so, he must be held to be bound by what he has done.

These are the whole facts and circumstances of the argument which belong, in my opinion, to this case ; and they leave me, without any hesitation, in the position of being bound to affirm the decision of the Court below. With respect to the first injunction there is no question. The only question is with respect to the second.

The other topic to which my noble and learned friend has adverted I need not repeat any observation upon, because that is disposed of by the present decision. The same grounds which have been taken now must be the grounds on which the case will hereafter have to be dealt with ; the same arguments will arise, and the same facts will be stated on either side ; and, therefore, as we can see no reasonable doubt upon this case, we are now really disposing of the whole question.

With respect also to what my noble and learned friend said of the irremediableness of the case not existing at all, I entirely concur in that statement.

Upon these grounds, and without adding anything further, except apologising for going so much at length


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into the case after the opinion delivered by my noble and learned friend, I entirely concur in every particular with him, that the order of the Court below upon the two injunctions ought to be affirmed.

Lord Campbell.—Agreeing entirely with the view of the case taken by my two noble and learned friends who have preceded me, I have but very few observations to add to those which your Lordships have already heard. I do not feel it incumbent at all to enter into the facts of the case, which have been stated so fully, so clearly, so lucidly, and so correctly by my noble and learned friend on the woolsack.

With regard to the first injunction—that obtained by *Mr. Neeld* against the Duke of *Beaufort*—I must own that I never entertained the slightest doubt; and down to this moment I have not been able to learn on what ground his honour the Vice Chancellor of England dissolved that injunction.

I entirely agree with the decision of the Court of Common Pleas. I think that that Court rightly held that the legal estate was still in the Duke, and that the ejectment was maintainable. But that being so, how the Duke, after what had been done by *Mr. Wedge*, his agent, and after the consent signed by his own hand, and after the



and after a very anxious consideration of all the circumstances, I now come to a clear and satisfactory opinion that that injunction ought to be dissolved, and that the decree of Lord Chancellor *Cottenham* ought to be affirmed.

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The question really is, whether the Duke of *Beaufort* had a right to come to ask for the interference of a Court of Equity; for it must now be recollected that he is the actor. He comes, and he solicits the interposition of a Court of Equity in his favour.

Now there can be no doubt that *Francis Wedge* was his agent for the inclosure and for the exchange. He was his general agent for these purposes. The secret limitation imposed by him on the authority of his agent, uncommunicated to the other side, goes for nothing. I have no doubt in the world that the Duke did impose that limitation on Mr. *Wedge's* authority. That is a matter between Mr. *Wedge* and him, and it is wholly immaterial to Mr. *Neeld*.

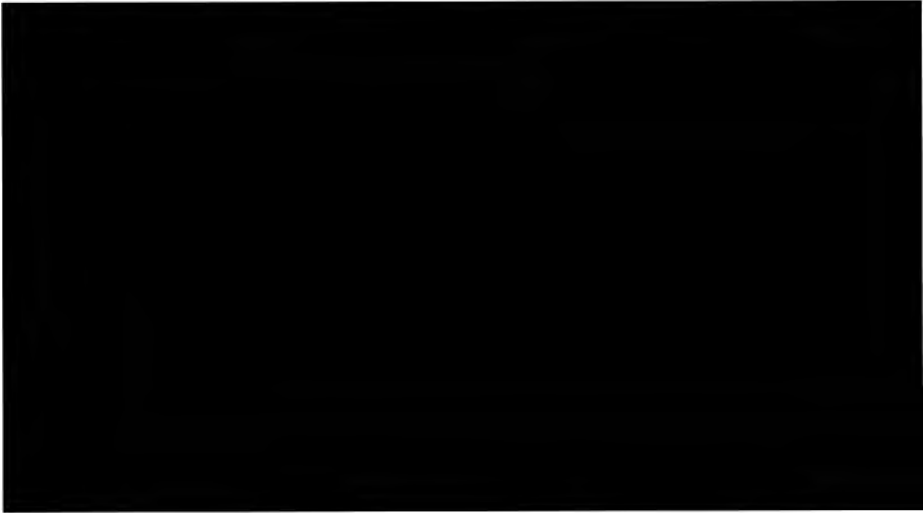
But then we come to the consent, which was signed by the Duke's own hand; and at that time again I believe what the Duke says, that he was ignorant of what he was doing. Because he is a man of unblemished honour, I have no doubt that everything he says is strictly and correctly true. But he has the means of knowing; he wilfully shuts his eyes (I do not say that offensively at all), with the means of knowledge within his power; and it being his duty to have ascertained the fact, can he be heard to say, "I was ignorant; relieve me from the effects of the mistake which I have made."

The learned counsel for the appellant cited a great many cases, which are perfectly well decided, to shew that, where the interposition of a Court of Equity is asked against a man who has fallen into a mistake, it will not interpose. There may be certain cases in which equity will not consider him bound by that which he has done under a

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mistake. But, notwithstanding Mr. *Turner's* great learning, industry, and research, he could point out no case in which a Court of Equity had been successfully asked to interpose in favour of a man who wilfully was ignorant of that which he ought to have known—a man who, without exercising that diligence which the law would expect of a reasonable and careful person, committed a mistake, in consequence of which alone the proceedings in Court have arisen. No such case is to be found; and it would be a reproach to the law if there could have been such a decision.

I must now, therefore, consider the case as in the same situation as if the Duke, without the interposition of Mr. *Wedge*, had transacted the whole of this affair personally, and had given his consent to the exchange, with the full knowledge that Dunley Gorse was named. Then, if that be so, can he come to a Court of Equity and say, The legal estate is not transferred, the consent is inoperative, there is some irregularity in it? Could he come to a Court of Equity and say that, after having given his consent in that manner, with the knowledge of all the facts, and with a part performance of that agreement into which he had entered? He clearly could not. If he could not, having transacted that affair personally, he can as little do so having transacted it by his agent, and he himself having



ships are just in as good a situation now to come to an opinion as you could be on the hearing, and there is no question that can possibly arise upon the hearing that you may not satisfactorily now dispose of. It seems to me, therefore, that the just view of the case is taken by my noble and learned friend, and that this decree ought to be affirmed.

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With regard to the argument that was relied on, that the Duke was only tenant for life, we have nothing to do with that whatever. No other parties are before us as plaintiffs. It might have been a very different case if the trustees or the remainder-men had filed their bill and asked for an injunction. But how that might have been I do not at present undertake to say. I, therefore, think that this decree ought to be affirmed. I have no doubt that every thing that the appellant says is perfectly correct. I have no doubt that he gave those instructions to his agent. I have no doubt that, in point of fact, he was in ignorance when he signed the consent. But that is wholly unavailing in the consideration of this case, and he must pay the penalty for any neglect of his agent, and for any neglect of his own.


Lord Cottenham.—My Lords, the grounds upon which I made the order appealed from were so fully stated by me upon that occasion, that I should not have thought it necessary to say anything more in explanation of them, had it not appeared to me that those grounds were in the first argument at your Lordships' bar very much misapprehended.

The first argument at the bar was principally directed to shew that the paper signed by the Duke was not such a consent in writing as the act required, and that there were other acts of the commissioners under the act which were not regular, and would invalidate the award he proposed to make.

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My order proceeded upon grounds totally distinct from any such considerations, and was founded upon a principle which I conceive to be of the highest importance in the administration of equity, and which the first argument of the appellant upon the point of law, however conclusive, would not affect. The order made in the Duke's suit was upon his application to restrain the commissioner from making any award founded upon the consent in question, or in any way affecting the piece of woodland, called Dunley Gorse: that is, he asked the Court, upon certain grounds of equity alleged, to protect him against the legal operation of the proposed award, or at least against the inconvenience in which making the award might involve him. What errors there may have been in the proceeding, or what grounds there were for doubting the legal effect and operation of the award when made, I thought, and still think, immaterial for the purpose of disposing of the application for an injunction, if the Duke had not shewn good equitable grounds for the interference of the Court.

The grounds on which he relied were simply these: that he was willing to exchange Dunley Gorse for other land belonging to Mr. *Neeld*, but that he was only willing so to consent, if he could get woodland in exchange for Dunley Gorse, and that he prohibited Mr. *Wedge*, his



ment that Mr. *Neeld* should have Dunley Gorse in exchange for other lands of his to be given up to the Duke, and which the commissioner proposed by his award to carry into effect. Possession was taken of the lands so made the subject of exchange, and other acts of part-performance occurred, amply sufficient in an ordinary case to dispense with the necessity for the contract being in writing under the Statute of Frauds.

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The Duke seeks to be relieved from the consequences of this transaction, and has brought ejectment for the purpose of recovering possession of Dunley Gorse. But the only equity he sets up is that Mr. *Wedge* acted contrary to his instructions in accepting any land but woodland in exchange for Dunley Gorse: for it is not disputed that he did authorise him to exchange Dunley Gorse, though he adds that it was only to be exchanged on the terms of wood for wood. The question is whether any equity can be founded upon such private instructions limiting the actual meaning of the consent he signed.

It is true that this paper was not addressed to Mr. *Wedge*, but it was a written declaration and a professed authority for exchanging Dunley Gorse for other land, without any restriction as to its quality, referring the selection to the discretion of the commissioner. This paper was sent to Mr. *Wedge*, and by him delivered to the commissioner. The agency of Mr. *Wedge* in arranging the exchange on behalf of the Duke is not disputed, and although the paper was addressed to the commissioner, the Duke admits that the detail of the arrangement was to be settled by Mr. *Wedge*, whose settlement would, of course, be adopted by the commissioner so far as concerned the Duke. The paper, therefore, must be of the same effect as if it had been a direct authority to Mr. *Wedge*. That, however, is not material, as it cannot affect the present question whether Mr. *Wedge* or the

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commissioner be considered as having acted on behalf of the Duke in the agreement with Mr. *Neeld*.

Thus then there is an agreement, entered into by an agent, having in his hand a written authority from the principal, in terms clearly justifying the contract into which he was entering. The fact of Mr. *Wedge* having agreed to the exchange, and of the commissioner having adopted it, is not in dispute. The commissioner allotted to the Duke, in exchange for Dunley Gorse, other land which he considered desirable for him, forming that opinion by the suggestion and under the advice of the Duke's agent. If the principal be entitled to the assistance of a Court of Equity to be relieved against a contract so entered into, upon the ground that he had previously instructed his agent not to enter into a contract except under circumstances which did not occur, and to which no reference appeared upon the face of the authority, then the ground upon which the order was made fails. But I hold it to be quite clear that the principal has no such equity.

In *Martyn v. Kingsly* (a) a scrivener who had been intrusted with the custody of a bond, received the money and delivered up the bond, and it was held that the obligee was barred. (On this point the note to *Roberts v. Matthews* (b) was referred to by his Lordship.) In *Hamilton v. Lord Clanricarde* (c) a lease executed by

have been misapprehended in the first argument at the Bar.

The principle is, I conceive, perfectly plain and well established ; and can there be a question as to whether this case falls within it ? Did not the paper signed by the Duke hold out to all who might negotiate with Mr. *Wedge*, or the commissioner, reason to believe that the Duke was willing to take any land that might be agreed upon in exchange for Dunley Gorse. Having given this general authority, can he be heard to say that this authority was limited by private instructions of which those who dealt with the agent knew nothing. If then the act of the agent is binding on the principal, and the contract entered into, though by parol, was accompanied by circumstances sufficient to take it out of the Statute of Frauds, upon what ground is a Court of Equity to interfere, and by injunction to restrain the further progress of the exchange agreed upon ? If there are legal impediments to the completion of the contract, it may not be possible to decree a specific performance. But that can be no ground for relieving the principal from the consequences of the contract, whatever they may be, and if that be so, the order upon Mr. *Neeld's* application is a matter of course, because in this view of the case, the Court will not permit the possession, which was given in execution of the contract, to be changed pending a suit for its completion.

This case was assimilated to orders restraining public companies from exceeding the powers given them by their acts. I am not disposed to restrict the exercise of that jurisdiction. No Judge has had more occasion than myself to exercise it. But it proceeds upon a principle quite foreign from the present case. There is not in this case any excess of jurisdiction. Exchanges of old inclosed lands are within the very terms of the act ; and if the commissioners err in the exercise of their power, an appeal is given to the Quarter Sessions. This remedy, it

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was contended, was inadequate ; and it was said that irreparable injury might arise to the Duke, as the award is by the act conclusive, except in the case of a successful appeal. If the appeal be an inadequate remedy, it may be equally so in the numerous cases in which the act of Parliament gives such an appeal. But that does not furnish any ground for the interference of a Court of Equity ; if it did, the object of the act, in providing a speedy termination of all questions which might arise, would certainly be disappointed. I did not, however, intimate any opinion that a case for the interference of a Court of Equity might not arise, if brought forward by proper parties ; but merely that, after what had taken place, the Duke could not be heard in a Court of Equity to ask to be relieved from the effect of the exchange which had been agreed upon by his agent, which is the whole of his bill. For although it does allege some objections to the proceeding of the commissioner, the only prayer is relief against the consent given. If the contract be binding upon the Duke, means may be found of correcting these errors. The Duke, it appears, is only tenant for life ; but the powers which he derives under the act, of dealing with the property, may be found available for carrying the agreement into effect. That will be seen at the hearing of Mr. *Neeld's* suit. Certainly these difficulties cannot give to the Duke

suit to support his suit

case of *Mansford v. Jacob*, in 1843 (e). The plaintiff there was entitled to a right of common over certain waste lands. Steps had been taken for the inclosure of this waste under the Statute of the 6 & 7 Will. 4. To this inclosure, the person through whom the plaintiff claimed, objected upon the ground that the act did not authorize the inclosing of waste lands. But after consulting counsel upon that point, he withdrew his opposition and signed the resolutions for promoting the inclosure, and afterwards joined in several proceedings in the prosecution of it. And upon these grounds the defendants insisted that the plaintiff was estopped from disputing the inclosure, and that there was a sufficient binding contract to establish it. The plaintiff, nevertheless, moved before the Vice-Chancellor for an injunction to restrain the defendants from dealing with the allotments which had been made to them by the commissioner, and he disputed the legality of the inclosure under the act. The motion was refused, with costs, by the Vice Chancellor, and afterwards that order was confirmed by the Lord Chancellor, the former saying that whatever might be the legal rights of the parties, as to which he gave no opinion, there was no ground of equity on which the plaintiff could ask for the interposition of the Court in his favour.

Now if the Duke of *Beaufort* was bound by the acts of his agent, Mr. *Wedge*, and of the commissioner, to which, with the Duke's consent in their hands, they induced the defendant to become a party, as the plaintiff in the case referred to was bound by the acts of his predecessor, the two cases are identical. In both there was a contract, or a dealing, giving to the defendants an equity equivalent to a contract. In both, the question of law affecting the validity of the inclosure was immaterial, and in neither was there any equity for the interference of the Court with the proceedings in furtherance of the inclosure.

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Lord *Campbell*.—My Lords, I omitted to state what I meant to have done, that I do not at all doubt the jurisdiction of the Court of Chancery to grant an injunction against the making of an award under these circumstances, if a proper case be made out; and I do not yield to the argument that was urged at the Bar, that the giving an appeal to the Quarter Sessions takes away the jurisdiction of the Court of Equity. I have no doubt at all that the jurisdiction of that Court remains untouched; but my opinion is, that no case is here made out for the exercise of it.

Lord *Cottenham*.—I entirely concur in the observation of my noble and learned friend. What I meant was this, that the supposed inadequacy of the remedy, by appeal to the Quarter Sessions, did not create an equity to entitle a party to an injunction in a case like the present. There might be an equity independent of that.

It was ordered that the appeal be dismissed, and that the two orders of the Court of Chancery therein complained of be affirmed: and it was further ordered that the appellant should pay the respondent, Mr. *Neeld*, and other respondents, all the costs incurred by them respectively, in respect of the appeal—Lords' Journals, May 23, 1845.

IN COMMITTEE OF PRIVILEGES.

THE WHARTON PEERAGE.

It appeared by the Parliamentary pawns of 36 H. 8, and 1 Edw. 6, that a writ had been directed to "*Thomas, Lord Wharton*" for each of these Parliaments; but there was no evidence of his sitting in either of them or of the writ itself. The Journals of the House of Lords shewed that he was summoned to, and sat in, the Parliament of the 2d of Edw. 6, and subsequent Parliaments. Creation of baronies by patent was not then unusual; but no patent or record or other trace of a patent, creating the Barony of *Wharton* could be found:—

Held, that the said Barony was created by writ and sitting in the 2d of Edw. 6, and was descendible to heirs general (of the body).

A decretal order in Chancery, reciting the substance of the bill and answer, is admissible, on proof of pedigree, to establish the identity of parties to the suit.

But an answer alone, though sworn but not filed, is not admissible.

Scotch wills, registered in the Court of Session, are retained there, and if it is necessary to prove any such wills in *England*, a certified copy is given out, and is admitted to probate in the *English* Ecclesiastical Courts. The Lords Committees for Privileges will not, on claims of Peerage, receive such copy, unless it is shewn that the original will cannot be produced.

If a judgment of outlawry stand in the way of a claim to a barony in abeyance, although it is clearly erroneous, the committee of privileges cannot overlook it or reverse it; but the claimant must apply to the proper tribunal for its reversal, and produce the judgment of reversal to the committee.

1844.
April 2, 30.
May 13, 21,
27.
1845.
March 17,
June 10,
July 17, 24.
}
*Barony in
abeyance:
Creation of it.
Evidence.
Outlawry.*

CHARLES KEMEYS KEMEYS TYNTE, of *Halswell*, in the county of Somerset, Esq., presented a petition to the Queen, in *February*, 1843, praying her Majesty "to determine the abeyance of the Barony of *Wharton* in his favour, by commanding a writ of summons to Parliament

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to be issued to him by the name and style of Baron *Wharton*."

The petition stated, in substance (a), that Sir *Thomas Wharton*, Knight, was summoned to Parliament as a Baron of the realm, by writ, in the 36th year of the reign of Henry VIII. (1544), and to other Parliaments, in the reigns of *Edward VI.*, *Mary*, and *Elizabeth*, and that having sat in divers Parliaments pursuant to such writs, he acquired the dignity of a Baron of the realm to him and the heirs of his body: that, upon his death, in the year 1568, his son and heir, *Thomas*, became second Lord *Wharton*, and was summoned to, and sat in Parliament in the 13th and 14th years of the reign of *Elizabeth*: that, on his death in 1573, his son and heir, *Phillip*, then a minor, became third Lord *Wharton*, and was summoned to Parliament in the 23d of *Elizabeth*, and sat in that and divers subsequent Parliaments, until the 1st year of the reign of *Charles I.* (1625), when he died, having had issue two sons—namely, *George*, who died in 1609 without issue, and Sir *Thomas Wharton*, who died in 1623, leaving *Phillip Wharton*, his son and heir, who, being also the heir of his grandfather, the third Lord, on his death became fourth Lord *Wharton*, and was summoned to Parliament in the 15th of *Charles I.* (1639), and sat in that and numerous Parliaments, down to the time of his death in 1695.

who, on his father's death, became fifth Lord *Wharton*—and *Margaret*, *Mary*, and *Philadelphia*, the 2d, 3d, and 5th daughters: that *Margaret's* issue are all extinct: that *Mary's* issue also, by her first husband, are extinct, and that, by her second husband, Sir *Charles Kemeys*, of *Kevenmably*, in the county of *Glamorgan*, Bart., she was the ancestrix of this petitioner: that *Philadelphia* married Sir *George Lockhart*, of *Carnwath*, in *Scotland*, and was the ancestrix of *Baillie Cochrane*, Esq., and of Mrs. *Aufrere*, other coheirs of the Barony of *Wharton*: that the said *Phillip*, fourth Lord *Wharton*, had, by his third wife, one child, who died without issue in 1689.

The petition then stated that the said *Thomas*, fifth Lord *Wharton*, was summoned to and sat in Parliament in 1696, and that having, in 1706, been created, by letters patent, Earl of *Wharton*, to him and the heirs male of his body, and, in 1715, Marquess of *Wharton* and *Malmesbury*, with the same limitation; he died in 1715, leaving one son, *Phillip*, who succeeded to all his honours, and two daughters, *Jane* and *Lucy*: that the said *Phillip*, second Earl and Marquess, and sixth Baron *Wharton*, was, in 1719, created Duke of *Wharton*, and died, without surviving issue, in 1731, in *Tarragona*, in *Spain*—having been outlawed for high treason in 1729, which outlawry, as the petitioner was advised, was informal, and did not affect the dignities of the peerage—that upon his death, without issue, all his honours became extinct, except the Barony of *Wharton*, which then fell into abeyance between his sisters, the said *Jane* (then Lady *Jane Holt*) and *Lucy* (then Lady *Lucy Morrice*), and remained in abeyance until the death of *Lucy*, without issue, in 1739, when it devolved on *Jane*, but she did not assume the title in consequence of its having been supposed, erroneously, that all the dignities vested in the Duke were forfeited by the outlawry: that on *Jane's* death, without issue, in 1761, the Barony fell into abeyance among the

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heirs of the aforesaid *Elizabeth, Mary, and Philadelphia*, daughters of *Phillip*, fourth Lord *Wharton*, and has continued in abeyance ever since among their heirs.

The petitioner's descent from the said *Mary* was stated to this effect; that she had by her said husband Sir *C. Kemeys*, one son, *Charles*, and two daughters, *Jane* and *Mary*; *Charles* and *Mary* died unmarried, and *Jane* survived them, and married Sir *John Tynte* of *Halswell* aforesaid, Bart., and had issue three sons—who all died without leaving surviving issue—and one daughter, *Jane*, who married *John Hassell*, Esq., and left issue a daughter, *Jane*, who married *John Johnson*, of *Glaiston*, in the county of *Rutland*, Esq.—who and his issue assumed, by royal licence, the surnames of *Kemeys Tynte*—and the said *Jane* died in 1825, leaving the petitioner her son and heir.

The petition was referred by her Majesty, first to the Attorney General, and afterwards, with his report thereon, to the House of Lords, and the same were, by the House, referred to the Lords Committees for Privileges.

In *March*, 1844, and before the Committee of Privileges sat to consider the said petition, *Alexander Dundas Ross Cochrane Wishart Baillie*, of *Lamington* in *Lanarkshire*, in *Scotland*, presented a petition to her Majesty, praying her Majesty to determine the abeyance of the said barony in

of whom died in *vita patris et sine prole*, and the second, *James Lockhart*, assumed the name of *Wishart*, was a Count of the Roman Empire, and died in 1790—having been twice married—leaving two daughters, namely, *Maria Theresa* by the first marriage, and, by the second, *Marianne Matilda*, now the widow of *Anthony Aufrere*, late of *Hoverton*, in the county of *Norfolk*, Esq., and a coheir of the said barony : that *Maria Theresa* married Lieutenant General Sir *Charles Ross*, Bart., and had issue a son, who died without issue, and a daughter *Matilda Ross Wishart*, who married Sir *Thomas Cochrane*, and died in 1819, leaving this petitioner her son and heir.

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This petition also was, in the usual manner, referred by her Majesty to the Attorney General, and with his report thereon to the House of Lords, and by the House to the said Committee of Privileges.

At the first sitting of the committee (in April, 1844) ;
The Solicitor General (Sir *W. Follett*) and Sir *Harris Nicolas* appeared for Mr. *Kemeys Tynte*. Mr. *Austin* appeared for Mr. *Cochrane Baillie*. (The other coheirs did not claim the barony, nor appear by counsel or agents, although they had had notice of the claims of the petitioners). *The Attorney General* (Sir *F. Pollock*) attended for the Crown.

Sir *W. Follett* stated the case for the first mentioned petitioner :—

This is a claim to a barony, which must be treated as a barony created by writ, followed by a sitting in this House. The proof on this part of the case will not be difficult. Sir *T. Wharton*, the first baron, held an office of great trust under the Crown—Governor of *Carlisle*. It can be shewn that he was addressed by the Crown under the name of Sir *T. Wharton* in *February*, 36 Henry VIII. (1544), and was designated in another public document, in

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March of that year, by the name of "Baron *Wharton*." In the interval between these two periods the creation of the barony took place. Proof will be given that search has been made in all the places in which patents of that date were likely to be found, and that no trace of any patent, creating this barony, can be discovered. Evidence will also be given that on the 26th November, 1548, being the second year of the reign of Edw. VI., Baron *Wharton* was summoned to, and sat in this House as a peer. Upon this evidence it is submitted that according to the authority of the cases of the *Vaux* Peerage (c), the *Braye* Peerage (d), the *Camoy's* Peerage (e), and the *Hastings* Peerage (f), the Barony of *Wharton* must be deemed to have been a peerage created by writ, and by a sitting in Parliament, and therefore descendible to the heirs general of his body.

The pedigree will be easily proved, and the only difficulty apprehended in the way of making out the claim arises from the fact that an outlawry for treason issued against the last Baron *Wharton*, who had also been created Duke of *Wharton*, but this outlawry is in many most material respects defective, and must be set aside.

Several witnesses were then examined, and all stated that, after most diligent searches in the various repositories for the custody of public instruments, they did not discover a patent creating the Barony of *Wharton*, or any enrolment or other evidence of such a patent. They found many patents creating other peers in the reign of Henry VIII. Neither did they find any special writ, or enrolment of such writ of summons in that reign, to Lord *Wharton*; the writs of that time were not preserved but two Parliamentary Pawns (g) of the 36th of Henry

(c) Vol. V., *ante*, p. 526.

(e) Vol. VI., *ante*, p. 789.

(d) Vol. VI., *ante*, p. 757.

(f) Vol. VIII., *ante*, p. 144.

(g) "It became a practice about the time of King Hen. 8, when Parliament was to be called, for the clerks of the Petty Bag Office to

VIII., and 1st *Edward VI.*, were in existence, in each of which appeared the name of *Thomas, Lord Wharton*; and it appeared by the Lords' Journals that he was present among the peers in the Parliaments of the 2d and 6th of *Edward VI.*, and of the 5th and 6th of *Philip and Mary*, and that he had leave of absence, and appointed proxies, in several other Parliaments of these reigns and the reign of *Elizabeth*. It further appeared, by the said journals, that *Phillip*, the second *Lord Wharton*, sat in the House in several Parliaments of the last mentioned reign. The sittings of the succeeding Lords *Wharton* in the House were proved by the contemporaneous journals.

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A great many parish registers, monumental inscriptions, inquisitions, wills, and grants of administrations, were produced to prove the petitioner's pedigree. No question arose on them.

The following points arose in the course of the evidence on the admissibility of other documents:—

A decretal order in Chancery, made in 1699, in a suit between Sir *C. Kemey*s and Dame *Mary*, his wife, plaintiffs, and Sir *J. Thomas* and others, defendants, and in a cross suit between the same parties, was offered in evidence to prove the identity of Dame *Mary Kemey*s, and other parties, to those suits.

The Lord Chancellor expressed a doubt whether the decree was admissible for that purpose, without the bills and answers being also produced.

Mr. *Kelly* (g) said the bills and answers were fully

Chancery, in pursuance of a warrant from the Lord Chancellor, to prepare a schedule, in which were set down the forms of the writs to be issued to the Peers, and the names, style and title of the persons to whom such writs were to be sent, which are called Parliamentary Pawns."—Cruise on Dignities, 261.

(g) At and from the second sitting of the committee, on the 30th April, 1844, Mr. *Kelly* was, with Sir *H. Nicolas*, for Col. *Tynte*, in place of Sir *W. Follett*, who became Attorney General, on the promo-

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recited in this decree ; it appeared to be grounded on the admissions in the answers, shewing that the said Dame *Mary*—who is the ancestrix of the plaintiff, being a daughter of the fourth Lord *Wharton*—had been first married to a Mr. *Thomas*, and after his death she married Sir *C. Kemey*s. It is submitted that a decree, containing the whole substance of the bill and answer, is, under the circumstances, admissible.

The decree was received (*h*).

In order to prove the relation between different members of the family of *Kemey*s, so as to substantiate part of the pedigree, a private act of Parliament, enabling them to sell certain estates and describing the relationship, in the recitals, was offered in evidence.

Mr. Kelly.—This declaration of their relation, by the act of the legislature, is admissible as proof of the fact.

The Lord Chancellor.—It is very strong proof ; for it is the well known practice of this House not to allow the insertion of such a statement in the recitals of a private act of Parliament, unless the truth of that statement has been previously proved to the satisfaction of the Judges, to whom the bill has been referred.

The answer was received.

An answer in a suit in Chancery was offered as evidence to prove a part of the pedigree. The answer was offered as a statement by members of the family respecting the condition of the family, and Mr. *Bergey*, clerk of

the original answer, which appeared to have been sworn but never filed. The parties answering claimed to be heirs at law and members of the family.

The Lord Chancellor.—This is a declaration of pedigree to support an actual claim of right, put forward by the party who makes the declaration. This declaration, too, is in an answer which was never filed. It cannot be received as evidence for the purpose now proposed.

The answer was rejected.

Proof was offered to be given of a will of Sir *C. Ross*. It was proved that the original will, which had reference principally to property in *Scotland*, had been registered there; that a certified copy of it had been sent to *England*, and that on that certified copy probate was granted in *England*. The certified copy of the will was produced from the Prerogative Office in Doctors' Commons; and it was proved that certified or office copies coming from *Scotland* were in every way treated as originals in the Prerogative Office. The copy now produced was of this kind, and was taken off the file of the Prerogative Office. It was also proved that any original will, proved in *Scotland*, was registered in the books of the Court of Session, and was never given back to the parties, but that the Court did allow it to be produced in the hands of its own officer, whenever it was required.

On objection being made to the admission of the copy,

Mr. Kelly and Sir *H. Nicolas*.—This office copy is admissible in evidence. The Ecclesiastical Court here, which is the tribunal having peculiar jurisdiction over wills, has treated the certified or office copy from *Scotland* as an original will, and has thus admitted its authenticity. *Scotland* is, for this purpose, a foreign country; and the refusal of the Court of Session to allow the parties ever to have back a will which has been once registered, must be taken to dispense with the necessity of now producing the original document.

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The Lord Chancellor.—Scotland is not a foreign country as to the House of Lords. So that that reason is not sufficient for us to dispense with the production of the will. Neither a certified copy of a will, nor even an examined copy of a will, is evidence in this House (i) on a claim of peerage, unless you prove that you cannot get the original(j). The evidence here shews that it can be produced in the hands of the officer of the Court of Session. It must be produced.

The copy of the will was afterwards received *de bene esse*, the counsel undertaking to send for the original, or to produce cases, in which copies had been received in evidence.

The evidence for the claimant having been closed.

Mr. *Kelly* addressed the committee on it.—This is a barony by writ. In consequence of decisions of the House in numerous cases (k), it is now established that the evidence, as given here, of sittings in Parliament, is sufficient to support a claim to a peerage so created. The evidence as to the pedigree is complete, and, so far as the claimant knows, is not contested on the part of the Crown. That evidence proves him to be one of the coheirs of the barony.

There are two points in the case : the first relates to the creation of the peerage by writ of summons and sitting, which, it is submitted, has been clearly established ; the other relates to the effect of an outlawry for high treason,

the outlawry issued against him. Still as he knew that this outlawry would be made the subject of notice, he has produced evidence of the judgment in outlawry, and the question now will be what is the effect of that judgment upon the present claim? But, before entering on that question, there is another which may be submitted to the notice of the committee, and that is whether the outlawry can be sustained. It is submitted that the outlawry is absolutely null and void, under the statutes 31 Eliz. c. 3, and 4 & 5 W. & M. c. 22, and that consequently the mere fact of its having existed, or been irregularly issued, can produce no effect on this claim. The question then arises whether this committee will itself examine the judgment of outlawry, and act upon the opinion formed upon that examination, or will, in the first instance, assume the outlawry to be good, and require the claimant to go to the Court of Queen's Bench and get it reversed. The defects are apparent on the face of the judgment, and shew it to have been pronounced in disregard of the provisions of the statutes. The first of these statutes is the 31 Eliz. c. 3, which regulates the proceedings in outlawry in civil actions. This was extended by the 4 & 5 W. & M. c. 22, s. 4, to all cases of indictments for criminal matters. The latter statute was only passed to continue for the period of three years, but by the 7 & 8 W. 3, c. 36, s. 4, it was made perpetual. By the provisions of the first of these statutes it is clear that there ought to be a writ of proclamation, and three proclamations made thereon, and that they ought to appear on the face of the record, and that unless they are issued and recorded the judgment is *ipso facto* void; *Anonymous* (k), *Case of Outlawry* (l), *Anonymous* (m), (where the reversal was, because it was not shewn that proclamation was made at the parish church, where, &c.,)

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(k) Styles, 297.

(m) March, Rep. 20.

(l) Litt. Rep. 150.

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The King v. Wilkes (n), *Barrington v. The King* (o), *The King v. Yandell* (p). The words of the 31 Eliz. are precise, "and all outlawries had and pronounced after the end of the next Easter Term, and no writs of proclamation awarded and performed, according to the form of this statute, shall be utterly void and of none effect." The objection to the judgment of outlawry being of this very plain and unquestionable kind, it is submitted that the committee will not require the claimant to bring his writ of error, but will deal summarily with the matter. That was the course pursued in the case of *Belly v. Algor* (q), where an outlawry was reversed without writ of error, on account of the omission of the words "made upon three several days, whereof one proclamation, &c."

The Lord Chancellor.—Here the outlawry has been acted on, and the party has been, for a variety of purposes, treated for a long period of time as duly outlawed. This committee, therefore, cannot now assume the outlawry to have been utterly null. Application must be made to the Court of Queen's Bench either by motion or by writ of error, and if that Court shall be satisfied that the objections are fatal, it will reverse the outlawry. This committee cannot do that. The Lords now present are not sitting as a House. We constitute only a committee of the House, sitting merely for the purpose of inquiry into

sideration of the claim, in order to enable him to make an application to the Court of Queen's Bench.

The application was granted.

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At the next sitting of the committee (the 10th of June, 1845),

Mr. *Kelly*, with Sir *H. Nicolas*, stated that since this case was last before their Lordships, proceedings had been taken in the Court of Queen's Bench to reverse the judgment of outlawry passed against the Duke of *Wharton*, the last Baron *Wharton*, and it had been reversed (r). He now proposed to give in evidence the judgment of outlawry, and the judgment of that Court reversing the same.

Mr. *Bond*, a clerk of a branch of the public Record Office (in *Carlton Ride*), brought up the two judgments, and the judgment reversing the outlawry, was read at length.

Mr. *Kelly* said the evidence being now complete, he

(r) 25th November, 1844.—On this day Colonel *Tynte*, the claimant, appeared in the Court of Queen's Bench, and as one of the coheirs of *Phillip Duke of Wharton*, delivered in an assignment of errors in the matter of the outlawry of the Duke, who was the last person that had enjoyed the dignity of the Barony of *Wharton*, of which Colonel *Tynte* was a claimant.

May 3, 1845, Mr. *Kelly* applied to the Court to reverse the outlawry which had been issued against the Duke of *Wharton*; and stated that the Solicitor General and Mr. *M. D. Hill*, who had been instructed on the part of the Crown, had fully considered the question, and were of opinion that the outlawry could not be supported.

Lord *Denman*.—But we must have some reason assigned to us for reversing any judgment of this Court.

Mr. *Kelly*.—There does not appear to have been any writ of proclamation, nor is it stated on the face of the record that any proclamations were made according to the form of the statute.

Mr. *M. D. Hill* afterwards appeared on the part of the Crown, and stated that the counsel for the Crown had examined the record, and considered the objections to the outlawry assigned as errors; and were of opinion that the outlawry could not be supported.

Lord *Denman*.—Then let the judgment of outlawry be reversed.

Judgment of outlawry reversed.

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was ready to finish his summing up, but the further search—which was directed by the committee at the last sitting to be made for cases, if any could be found, in which, where Baronies were supposed to have been created by patent, no patent could be found to exist—had not yet been completed.

The *Solicitor General* said the search was proceeding with diligence in the Rolls Chapel and other offices, but further time was required to complete it.

The committee desired that the search should be proceeded with expeditiously.

At the next sitting of the committee (the 17th *July*), The *Attorney General* (Sir *F. Thesiger*) stated that he had, according to the desire expressed by their Lordships, directed that the utmost diligence be used in the search, whether there was any known instance of a peerage being created by patent, and that patent not being found; and he could now inform their Lordships that no such instance had been discovered.

The *Solicitor General* (Mr. *Kelly*) then finally summed up the case on the part of Colonel *Tyntie*. The first point which, it is submitted, is established in this case, is that this peerage was created by writ, and a subsequent sit-



nullity. It has since been reversed upon writ of error in the Court of Queen's Bench, and the record of the judgment of reversal has been brought up before this committee; and thus all further discussion on the effect of the outlawry on the present claims becomes unnecessary.

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It appears that there were two abeyances of the Barony, the first being, on the death of the last Baron without surviving issue in 1731, between his two sisters, Lady *Jane Holt* and Lady *Lucy Morrice*. There is no doubt that, on the death of the latter in 1739, her surviving sister, Lady *Jane Holt* had then a right to the Barony; but, in order to revive it in a female, letters patent from the Crown would be necessary; a trouble and expense which a lady advanced in years and without children might not think it right to incur; or, as there was an erroneous supposition that the dignity was forfeited by the outlawry of the last possessor, the Barony, for one or other of these reasons—and either was sufficient to account for her not claiming it (*s*)—remained dormant until, on the death of this lady without issue in 1761, it fell again into abeyance among the respective heirs of the three sisters of the fourth Baron. Lords *Willoughby D'Eresby* and Lord *Cholmondeley* are the coheirs of the eldest of the sisters; they do not claim the dignity. Colonel *Tynte* is proved to be the sole heir of the second sister, and is consequently entitled to be preferred to the heir of the third sister, who, it is to be remembered, is not represented by a sole heir, but by coheirs, Mrs. *Aufrere* and Mr. *Cochrane Baillie*.

The Lord Chancellor.—We cannot in our report state any preference; there is none between females or their heirs.

Mr. *Walpole*, for Mr. *Cochrane Baillie*, only wished to make one observation, and that was on that last point mentioned. Their Lordships never made any distinction as to precedence in the divisions of coheirship. All

(s) See the *Fitzwalter* Peerage, Vol. X., *ante*, p. 952.

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coheirs were treated as equal in degree, and the circumstance of there being more than one coheir of the third sister, was not of the least importance.

The Lord Chancellor.—We have nothing to do with that, which is a matter for the consideration of the Crown.

Lord Cottenham.—When a peerage is in abeyance, the main question for the House to report upon to the Crown is, in whom is the dignity in abeyance.

Mr. Walpole then called a witness, who proved that *Mr. Cochrane Baillie* is the person described in Colonel *Tynte's* petition as *Mr. Baillie Cochrane*, and in his own petition as *Cochrane Wishart Baillie*.

The Attorney General expressed himself satisfied with the proof of the pedigree. On the question whether this dignity was a Barony, created by writ or patent, he thought that there was more satisfactory evidence here than in any of the cases referred to; and it seemed to him that the search which at their Lordships' desire he had caused to be made, was strong negative proof that the dignity had been created by writ of summons.

The Lord Chancellor.—I have attended carefully to the evidence, and I think, so far as I may refer to my own impressions of it as it proceeded step by step, that the claim has been satisfactorily made out.

"That upon the death of *Phillip James*, the sixth Lord *Wharton*, in 1731, without issue, the said barony fell into abeyance between his two sisters and coheirs, Lady *Jane Coke* and Lady *Lucy Morrice* :

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"That Lady *Lucy Morrice* died without issue in the year 1739: that upon the death of Lady *Jane Coke* (who survived her sister,) without issue, in 1761, the said barony fell into abeyance between the descendants of the three daughters of *Phillip*, fourth Lord *Wharton*, *Elizabeth*, *Mary*, and *Philadelphia Wharton* :

"That the petitioner *Charles Kemeys Kemeys Tynte* is one of the coheirs of the said Barony, as being descended from, and sole heir of, *Mary* one of the said daughters of *Phillip*, fourth Lord *Wharton* :

"That the petitioner *Alexander Dundas Ross Cochrane Wishart Baillie*, with Mrs. *Matilda Aufrere*, are two other of the coheirs of the said Barony, as being descended from *Philadelphia*, the youngest daughter of *Phillip*, the fourth Lord *Wharton* :

"That the Right Honourable *Peter Robert Lord Willoughby D'Eresby*, and the Most Noble *George Horatio Marquess of Cholmondeley*, are two other of the coheirs of the said Barony, as being descended from *Elizabeth*, only daughter of the said *Phillip*, fourth Lord *Wharton*, by his first marriage :

"And consequently, the said barony is now in abeyance between the said petitioner *Charles Kemeys Kemeys Tynte*, the said petitioner, *Alexander Dundas Ross Cochrane Wishart Baillie*, esq., Mrs. *Matilda Aufrere*, the Right Honourable *Peter Robert Lord Willoughby D'Eresby*, and the Most Noble *George Horatio Marquess of Cholmondeley*."

These resolutions were reported to the House, and being affirmed, were afterwards reported to her Majesty.

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 June 3, 6, 12, WILLIAM DIXON - - - *Respondent.*
 26.

*Fixtures.
 Real or
 Personal
 Estate.
 Heritable or
 Moveable
 Effects.*

The absolute owner of land, for the purpose of better using that land, erected upon and affixed to the freehold certain machinery :—

HELD, that in the absence of any disposition by him of this machinery, it would go to the heir as part of the real estate.

If the *corpus* of such machinery belongs to the heir, all that belongs to that machinery, although more or less capable of being detached from it, and more or less capable of being used in such detached state, must also be considered as belonging to the heir.

No distinction arises in the application of this rule, from the circumstance that the land did not descend to, but was purchased by the owner.

THIS was an appeal against a decree of the Court of Session, arising out of the following circumstances :—

The late *John Dixon* was an extensive coal and iron mine owner, and was at the time of his death engaged in working mines, some of which were his freehold property, having been purchased by himself, while of the rest he was tenant under leases for various terms. A very valuable portion of his property consisted of engines employed in

brothers, had become, by the death of the other, sole heir at law to his father. In this suit she alleged that the share of her father's personal property, to which she was entitled as *legitim*, amounted to 12,000*l*. The respondent in his defence declared his readiness to account for the personal or executry effects of his late father, in order that the appellant's share therein might be ascertained, but insisted that these executry effects did not include either the heritage left by the deceased, or such machinery or other articles as were *fundo annexa*. The appellant put in pleas in law, insisting that—

“The trade or employment of manufacturing iron or lime, and of digging coals to be used in these manufactories, or for sale, or, in other words, the trade of a coal-master, or iron-master, or lime-worker, is of a personal nature, and all instruments, engines, and utensils, whether fixed or loose, which are necessary and subservient to such a trade, are legally to be held and treated as personal or moveable effects or personalty; that instruments, engines, and utensils, which, taken either in part or in gross, are moveable before they are placed in a particular spot, do not lose their moveable or personal character, though affixed to an heritable subject, unless they be so affixed *perpetui usus gratia*, in contradistinction to trade, such as the windows of a mansion-house; and that the fund out of which *legitim* is payable, consists of the whole moveable or personal estate, as before described, that belonged to the deceased Mr. *Dixon*.”

The Lord Ordinary, before whom the cause was appointed to be heard, referred it to an officer of the Court, with instructions for him to report as to the nature and amount of the deceased's property. The referee reported that the engines, colliery utensils, and rails, were claimed by the defenders as heritable property, but that he considered it doubtful whether some of these articles came

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under that description, and he therefore made a list of those which he deemed to be of a doubtful or disputable nature. The Lord Ordinary not being satisfied with this report, remitted the cause to Mr. *Smith*, of Deanston, as a scientific person, to report exactly on the facts as to each part of the machinery, the nature of which was in dispute. Mr. *Smith* made his report, in the course of which he described all the machinery as capable of being moved and replaced, but said that the removal would be very expensive; that it would more or less deteriorate the value of the machinery; that for that reason machinery was often left by the tenant, and its value made a matter of arrangement between him and the landlord; and that some parts—such as the steam-engine for pumping the mines—must, if removed, be instantly replaced, or very serious damage would arise to the mines; that the articles which were moveable were all of them, more or less, essential to the going of the different works, though, if taken away, they could be readily supplied; that it was usual to have spare articles of most of the classes described about well regulated works, these articles being equally valuable if taken to any other work where they were wanted. He also referred to the practice of the country, and said, “that the practice at coal and iron works similar to those of the deceased, is to remove the mechanism of the engine and other machinery from one part of the premises to another as occasion may require.” . . .
 “The practice is for the tenant at the termination of his lease to remove the whole of such engines and machinery, if not previously belonging to the landlord.” . . . “And in the event of the exhaustion of the mineral field, or any permanent bar arising to the profitable working of the minerals, the whole of the engines and machinery is removed by the tenant or worker of the field, or by the proprietor (if his property), and the general premises dis-

mantled as far as it may be profitable to do so." Mr. *Smith* made out a list of the various articles, to which he attached the character of heritable or of moveable.

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The case was further debated before the Lord Ordinary, and the appellant then put in accounts, made up from time to time, by the testator, to shew the state of his affairs; and likewise inventories of purchases by himself, or by himself in conjunction with others, in all of which papers the lands and the leases of them were described as "heritable," and the steam-engines and the rails laid down were described as "moveable property." It was also submitted, on behalf of the appellant, as a proposition of law, that the principle that annexation to land converts that which is itself moveable into a fixture, could not be applied to articles used in trade and to the fittings up of collieries.

The respondent, in answer to the argument, attempted thus to be drawn from the manner in which the testator had in his accounts treated the steam-engines and rails, proved that in those same accounts houses were likewise included under his arrangement of "moveable property," from which he insisted that the deceased's mode of expressing himself in these papers was no indication of his deliberate intention, and could have no effect upon the case.

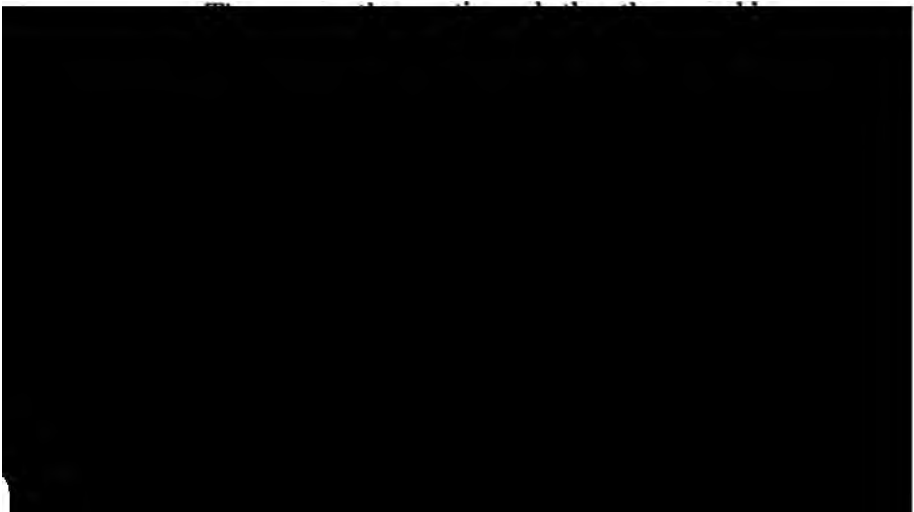
The Lord Ordinary, thinking the point raised in the case to be one of difficulty, referred it to the Lords of the Second Division, and their Lordships determined to consult the Lords of the First Division, and the permanent Lords Ordinary. Cases were therefore prepared for their opinions, and the great majority of their Lordships finally expressed an opinion to the effect, that the machinery which was fixed to the soil, and could not be used without being so fixed, and which were necessarily so fixed for the purpose of the profitable use of the land, were heritable; but that the tools employed in the machinery, but not necessarily affixed thereto, and capable of being employed elsewhere in the same manner, and parts of

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machinery prepared for fixing, but not actually affixed, were moveable—(See 5 Bell, M., D. & Y., p. 775).

Mr. *Turner* and Mr. *Sandford* for the appellant.

This is not a case between heir and executor, and must not be dealt with on the same principles as a case of that sort. Both the parties here are equally in the situation of heirs, and must be so treated. The same principles which favour the rights of the heir in his claim of the land, favour also the other children in their claim of *legitim*. Or if there is any difference to be made in the principle on which the relative rights of these parties are to be considered, that difference must be in favour of the appellant, for the respondent here is the executor of the deceased, and in that character is contesting this suit; and in the law of Scotland an executor is a mere volunteer claiming under the will. [Lord *Campbell*.—The claimant of *legitim* cannot be in a better situation than the creditors; on the contrary, if they are in opposition to him, his claim must give way to theirs.] It is submitted that, in such a case, his claim would be better than theirs, because of the contract made by the law for the benefit of the children upon the marriage of the parents. The right to *legitim* is a principle of law which exists in favour of children who might otherwise be left without any provision.



and next, that a considerable portion of them consists of leaseholds. The facts of this case, and the report of Mr. *Smith*, fully justify the claim of the appellant. The principle now contended for is laid down in the case of *Lawton v. Lawton* (a), where the machine was a fire-engine, used for the purpose of working a colliery, and that was held to be personal property. In that case a decision, by Lord Chief Baron *Comyns*, at the Worcester assizes, was referred to. There a cider mill, described as deeply fixed in the ground, was declared to be personal property. The rule of law in favour of trade was applied in both those cases; and the same rule must be applied here. The case of Lord *Dudley v. Lord Ward* (b) is another instance of the application of that rule; and there, too, the thing declared to be personal property was the fire-engine of a colliery. The case of *Lawton v. Salmon* (c) will be relied on by the other side. There an executor brought trover against the tenant of the heir at law to recover certain vessels used in salt works, and called salt pans, which had been erected by the testator, and which the Court held ought to go to the heir. But that case is not an authority for the respondent; for, throughout the proceeding, the Court treated the salt pans as a necessary part of the estate itself, that estate consisting of some salt springs, which, without these salt pans, would be almost useless to the owner. The description of the salt pans given by the Court was, that they were accessaries to the necessary enjoyment of the inheritance. It is clear that, admitting the correctness of that description, these engines, erected for the purpose of carrying on the trade of Mr. *Dixon*, were accessaries, not to the enjoyment of the estate, but to the carrying on of his trade. So that, conceding the full force of the case as to the salt pans,

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(a) 3 Atk. 13.

(c) 1 Hen. Bl. 259, n.

(b) Ambl. 113.

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there appears no reason for saying that the rule there laid down can be applied to the present. In *Grymes v. Bower* (d) the Court of Common Pleas held, that a pump erected by a tenant during his ~~tenure~~, though slightly affixed to the freehold, was removable as a tenant's fixture. The purpose for which the pump was erected—namely, a purpose of a domestic nature, and not the mere affixing to the soil—determined that case; and the same principle ought to decide the present. The doctrine stated by Lord *Ellenborough*, in *Elwes v. Mawe* (e), is, that “where the fixed instrument, engine, or utensil (and the building covering the same, falls within the same principle), is an accessory to a matter of a personal nature, it shall be itself considered personalty.” The intention of the parties is an important ingredient in the decision of this case. Here that intention was plainly shewn by the acts of the testator himself, who again and again treated the machinery on his land as moveable or personal property. That fact is decisive of the claim here. The case of *Trappes v. Harter* (f) shews that where fixtures are capable of being moved, and where they have been dealt with as belonging to trade, they form part of the personalty.

The *Lord Advocate* and Mr. *Kelly* for the respondents.

—This is a case between the heir and the executor, and

he is also the executor of the testator, does not take away from him his character of heir. The appellant claims a share in the personalty, and is endeavouring to set in motion the power of the executor ~~against~~ the heir. The rules applicable to cases of conflict between heir and executor are therefore applicable here, and the appellant cannot claim any benefit from any character she may suppose herself to possess as heir of a particular kind.

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If the argument of the intention of the testator, as giving a character to the machinery, is to be relied on, then it is submitted that that argument is altogether favourable to the respondent. The mere use of words wrongly used by the testator in his own accounts, cannot be taken as decisive of his intention; for he employed similar words with respect to property which was clearly real or heritable property, and to which no act nor expression of his could by possibility give a different character. But if his words are not of importance, his acts are. He was the absolute owner of much of the land on which these machines were erected. He could not, therefore, as to those lands, have any interest adverse to the owner of the land; and on the lands thus belonging to him he erected machines, which he affixed to the soil, and gave a permanent character which the law has not permitted to be doubtful. He did the same upon those lands of which he was only tenant; and his acts, therefore, contradict the supposition that he meant to preserve to these machines the character of moveables. They have become, by the law of Scotland, parts of the land *accessione* and *destinatione* (g); for they have been fixed on the land, and destined to purposes to which they could not be destined unless they were fixed in the soil, and which purposes are in fact those of gaining a

(g) Ersk., Bk. 2, Tit. 2, ss. 2, 3, 14; Bell's Principles, ss. 743, 1470, 1475.

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profit from the land. The fact that it is possible to remove them cannot affect the matter. *Trappes v. Harter* (h) was a question between a mortgagee and the assignees of a house, and cannot affect this case. They are things which do not devalue the value of the land itself, and render it capable of profitable employment. A house does not become part of the soil any more than does a steam engine, for one as well as the other may be removed; but the value of each, and its usefulness depend on its being fixed in the earth. The principle stated by Lord Mansfield in *Lawton v. Salmon*, is applicable to the circumstances of this case. His Lordship there said (i), "The owner erected them for the benefit of the inheritance; he could never mean to give them to the executor, and put him to the expence of taking them away, without any advantage to him, who could only have the old materials or a contribution from the heir in lieu of them. On the reason of the thing, and the intention of the testator, they must go to the heir." Where the owner of an estate erects buildings for the better enjoyment of the estate, those buildings must be considered as annexed to the freehold, and must go to the heir. The principle acted on in that case explains the decision in *Lawton v. Lawton* (j), which might otherwise appear an authority against the respondents. There the fire-engine of a colliery was held

first place, very little is known beyond the bare fact of what is said to have been the decision; the circumstances are not stated; and it may be that those circumstances, if known, would fully explain the case, and shew that it is no authority for the purpose for which it is now relied on by the appellant. It is very likely that the principle on which Lord *Hardwicke* proceeded, in the case of *Lawton v. Lawton*, was that on which Lord Chief Baron *Comyns* had proceeded in the Cider-mill case—namely, that the mill was erected for the benefit of trade, and that the creditors were claiming it as against the heir. All these matters are fully discussed by Lord *Ellenborough* in the very elaborate judgment delivered by him in the case of *Elwes v. Mawe* (*k*). In that case the erections in dispute were sheds put up for the more complete enjoyment of the land, and for that reason they were held to be fixtures. On the same principle, in the case of *Buckland v. Butterfield* (*l*), a conservatory was held to be a fixture.

The cases in which the convenience of trade is to be the principle on which the question of fixture or moveable is to be decided, are those where the erections are not made for the benefit of the better enjoyment of the land, but for the purposes of trade, where such erections are put up by persons having only a transitory interest in the land, and where they are claimed by the creditors of those persons. In such a case the rule to encourage trade applies, and the erection, though in fact affixed to the soil, having been affixed there for a particular purpose, may be removed, and the owner of the soil will be, after the removal of the erections, in the same situation as before they were put up. No one of these circumstances exists in the present case. The erections were made by the owner of the soil for the purpose of obtaining a profit from the soil; the claimant is not a creditor, but a child

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(*k*) 3 East, 49, *et seq.*

(*l*) 2 Brod. & B. 54.

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for whom he has made in his will what he deemed an ample provision, and the person who resists the claim is his heir and the universal disponee of his property.

The English authorities, which are much more numerous than the Scotch, are clear upon this point. But the principles of the Scotch law are decisive, and the few authorities to be found applicable to a case like the present, shew the ordinary course of the law in Scotland upon this subject. *Erskine (m)*, *Stair (n)*, *Bell (o)*, and *Hunter (p)*, all state as the law of Scotland, that buildings erected for the better enjoyment of the land go to the heir; and on the question of fixtures being heritable by destination, the case of *Johnston v. Dobie (q)* decided that windows, door frames, and the like, found in a house which was then in a course of being built, though not at that time fixed in their proper places, were by destination fixtures, and belonged to the heir. In both countries, therefore, the law is the same, and the decree of the Court below must be affirmed.

Mr. *Turner*, in reply :—The cases of *Lawton v. Lawton (r)*, and *Lord Dudley v. Lord Ward (s)*, are decisive of the present; for they were cases in which engines employed in a colliery were treated as part of the personal estate; and though the decision in the former appears to

profit from the soil, and were therefore, like agricultural buildings, which, in the case of *Elwes v. Mawe* (t), were held to form part of the real estate (u). The authorities in the Scotch law have recognised the distinctions made in favour of trade by the law of England, and it is submitted that those distinctions apply in this case, and that the buildings and machinery here having been erected for the purpose of the trade of the testator, must be considered as forming part of his personalty.

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Lord *Brougham*.—'This case was gone very fully into at the bar on both sides, and, on account of the length of the case, as well as the importance of the subject matter involved in point of value, and also in respect of some of the principles which were mooted, and some, indeed, which were disputed in point of law, your Lordships considered that it was fit that time should be taken for considering the case before finally pronouncing judgment. That consideration has been given to it, and I am now prepared to move the judgment which it appears to me, under the circumstances of this case, it is right to pronounce. I begin by laying out of view entirely what was very much relied upon, as it appeared to me, below, and much relied upon in the argument here, for the appellant, viz., a distinction taken between this case as a case of inheritance, and a case arising between executor and heir. In this case of *legitim*, as I understood them to argue, it is not a mere question between executor and heir, but it is a question between two kinds of heirs. Now that is a sort of argument I must say, with all respect for those who urge the distinction upon our attention, than which nothing can be more groundless. It is not a question

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(t) 3 East, 38.

(u) See *Naylor v. Collinge*,
1 Taunt. 19; and *Thresher v. The*

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603.

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between two kinds of heirs. In what way can you distinguish this case from the common case between heir and executor, as the argument endeavours to distinguish it? The executor is heir *in mobilibus*. That is the common expression of the Scotch law. The *legitim* here is due to those who are not heirs as to real property. It is that which is due out of what is called in Scotland the executry fund; that is to say, that which goes not to the heir, but which goes to the executor. It is, then, in his capacity of heir *in mobilibus* that the *legitim* goes to the child, that the bairn's part of gear goes to the bairn, because the bairn is heir *in mobilibus*; and, therefore, I cannot discover how the argument gains at all by insisting on this supposed distinction. I do not say that it loses, for it neither gains nor loses by the distinction; it is left precisely in the same state in which it was before the distinction was attempted to be set up. It is because the fund is executry and not heritable that the *legitim* attaches. After payment of the debts the surplus fund is divided into those parts of heritable and executry according to the Scotch law, which was originally, indeed, the old Saxon law of England, and is now the law of Scotland. That being the case—having relieved it from the embarrassment of this argument—I have not much to urge upon this case, because, upon the fullest consider-

creiff (to whose authority no person is disposed, generally speaking, to yield more entire and implicit respect than myself), whose most able and elaborate judgment thoroughly exhausts the whole case, not only upon principles but upon its details. But I must say that my mind goes not with his Lordship's judgment, but with the equally elaborate and equally able judgment of Lord *Cockburn*, who also goes into the principles and into the details of the case. I think Lord *Cockburn* has really left me little or nothing to add; and I am bound to say that, in my view, he and the other Judges joined with him have come to a right and sound conclusion.


Great reliance was of course placed upon the case before Lord *Hardwicke*, in our Court of Chancery here, and a similar case which occurred more recently in the Court of Exchequer, I think in Lord *Lyndhurst's* time (x). But there was an attempt made to distinguish this case in principle from that, and to shew that there was another inconsistent decision in the *Cider-mill* case. Now it is a remarkable circumstance, that of that case we have only a very indistinct and unsatisfactory report. We have really nothing that can be called a record of that case. It was cited in the case before Lord *Hurdwicke*; and I must also say, that, if the cider-mill case is to be taken as it is represented to us, as regards the substance of the case, and in its result, my mind goes not at all with that decision. It is contrary, undeniably, to the general principles of our law upon the subject; and if the same question were to arise to-morrow, with the circumstances which are represented to have attended that case, it would not, in my opinion, lead to the same result. Therefore I lay it out of view. We have a most imperfect account of the circumstances, and, above all, of the most material circumstances, of how the mill was affixed to the soil. For if a cider-mill be fixed to the soil, though it is a manufactory, and erected for the purpose of a manufactory, if it is really

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(x) 2 Crom. & Mes. 150; 3 Tyrr. 603.

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solo infixum, it is perfectly immaterial whether it is for the purpose of a manufactory, or a granary, or a barn, or anything else. It is a fixture on the soil, and it becomes part of the soil. Can any man say that one of the great brewhouses would belong to the executor because it is erected for the purpose of manufacture, and wholly unconnected with the land? For a brewhouse is as much unconnected with any crops upon the land upon which it is situated as a cider-mill can be said to be; it is for the purpose of brewing beer out of malt which need not have been raised on that land, but may have been grown in Russia or in Africa. It has nothing to do with the land, as may be seen by those who will take the trouble of looking at any of the brewhouses in London, which are established in places where it would be very difficult to find a blade of grass, much less a crop of barley of which to make malt. But although it is a manufactory, nobody says it belongs to the executor, nor constitutes what the Scotch generally call an executry fund, it would go unquestionably to the heir. The Scotch law appears to me only to differ from the English law in carrying the principles of our law, as laid down in the cases, a little farther rather than falling short of them. Upon the whole, therefore, I agree with Lord Cockburn. I do not differ from his arguments any more than I do from the conclusions to which they lead.



whether I could put my finger upon any part which has been wrongly disposed of, in favour of the respondent and against the appellant, in the Court below. If I had found that, I might have been somewhat obstructed in coming to the conclusion at which I have arrived. But my objection is to some of those articles being given to the appellant, not to the respondent; and, if there had been a cross appeal, I should have found some difficulty in resisting the argument, that there ought to have been a reversal or alteration in respect of some of those particulars. There are one or two that, in looking over, I made a query against; they are, however, of the most trivial nature, and upon them I should never advise your Lordships to reverse or alter the judgment below in any respect. Upon these grounds, therefore, I really have no hesitation whatever—as little as I ever had in any case—in recommending your Lordships to affirm the judgment of the Court below in all its parts.

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Lord *Cottenham*.—I concur in the opinion that this interlocutor ought to be affirmed; and, when we separate and distinguish the real case from some of the points which have been endeavoured to be introduced into it by way of argument, it does appear to me to be free from all doubt. The point which has been already alluded to—namely, that this is not a case between the real and personal representative, but that it is a case between two kinds of heirs—appears to me to be totally destitute of foundation. *Legitim* can only be claimed by means of shewing it to be personal estate. The preliminary question is therefore, is this personal estate, or is it property attachable to the freehold, and therefore descendible to the heir? The moment we see that the *legitim* can only be claimed in consequence of the property being part of the personal estate, the question of course assumes its natural shape, is it personal estate or not? That preliminary question, therefore, being decided, it entirely dis-

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poses of the ground on which this has been attempted to be distinguished from the other cases which have arisen with respect to the claims of heirs, and those who are interested in the personalty. The principal stress of the argument on the side of the appellant has been, that this is to be protected, because it is necessary for the encouragement of trade, that this property should be considered as not belonging to the real estate, but as belonging to the personal estate. The principle upon which a departure has been made from the old rule of law in favour of trade, appears to me to have no application to the present case. The individual who erected the machinery was the owner of the land and of the personal property, which he erected and employed in carrying on the works; he might have done what he liked with it; he might have disposed of the land; he might have disposed of the machinery; he might have separated them again. It was, therefore, not at all necessary, in order to encourage him to erect those new works which are supposed to be beneficial to the public, that any rule of that kind should be established, because he was master of his own land. It was quite unnecessary, therefore, to seek to establish any such rule in favour of trade as applicable here, the whole being entirely under the control of the person who erected this machinery.

If therefore this be clearly a question of real or personal estate, and if the rule, which in some cases has been acted upon, of making a departure from the established principle in favour of trade, has no application to the present case, what does it come to? Of course we throw out of consideration all the cases which have arisen between landlord and tenant, and between tenant for life and remainder-man, because the departure which has taken place there, in some cases, has no application to the present case. Then the case being simply this, the absolute owner of the land, for the purpose of better using that land, having erected upon and affixed to the freehold, and used, for the purpose of


the beneficial enjoyment of the real property, certain machinery, the question is, is there any authority for saying, that, under these circumstances, the personal representative has a right to step in and lay bare the land, and to take away all the machinery necessary for the enjoyment of the land? Let us consider for a moment, if that is the principle, to what extent is it to go. It is put by Lord *Cockburn* (and a very strong illustration it is), if the owner of the land should dig a well, and erect machinery for the purpose of using that well, is it competent to the personal representative to come and take away that machinery, and leave the well useless? He thinks it is not. Where is the distinction between the two cases? Such machinery is capable of being taken away with very little, if any, damage to the land. Although, therefore, machinery is in its nature, generally, personal property, yet, with regard to machinery, or a manufactory erected upon the freehold for the enjoyment of the freehold, nobody can suppose that that can be the rule of law; and so with respect to other erections upon land. It is not necessary to go beyond the present case, which is a case of machinery erected for the better enjoyment of the land itself. The principle probably would go a great deal farther; but it is more advisable to confine the observations I have to make to the particular circumstances of this case. There is no case whatever which has been cited in which that doctrine has been recognized, except the one which has been referred to (the *Cider-mill* case), as to which we really know nothing, except that at the Worcester Assizes, a good many years ago, a cider-mill was held to belong to the personal estate. Why it was so held, under what circumstances, and whether it was a cider-mill fixed to the freehold or not, we do not know. We know nothing except that this machine, called a cider-mill, was decided to go to the personal representative. It is impossible to extract a rule of law from a case of which we know so little as that. And, with that

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exception, there is a uniform course of decisions, wherever the matter has been discussed, in favour of the right of the heir to machinery erected, under the circumstances, in the present case; and if the *corpus* of the machinery is to be held to belong to the heir, it is hardly necessary to say, that we must hold that all that belongs to that machinery, although more or less capable of being used in a detached state from it; still, if it belongs to the machinery, and belongs to the *corpus*, the article, whatever it may be, must necessarily follow the same principle, and remain attached to the freehold. I do not go into the detail of the particular items which have been objected to. I have looked them through, and quite concur with my noble and learned friend, that if any exception were to be taken with respect to particular articles, as to whether they ought to be adjudged to one or to the other, it would have been for the respondent, and not for the appellant, to take such exception.

Lord Campbell.—I have very little to add to what has been said by my noble and learned friends who have preceded me, except that I entirely concur in the view which they have taken of this case. I own I was a good deal surprised that the point was so much pressed at the bar, that this was a case of *legitim*, and that it was not the whole question of what descends to the heir, and what



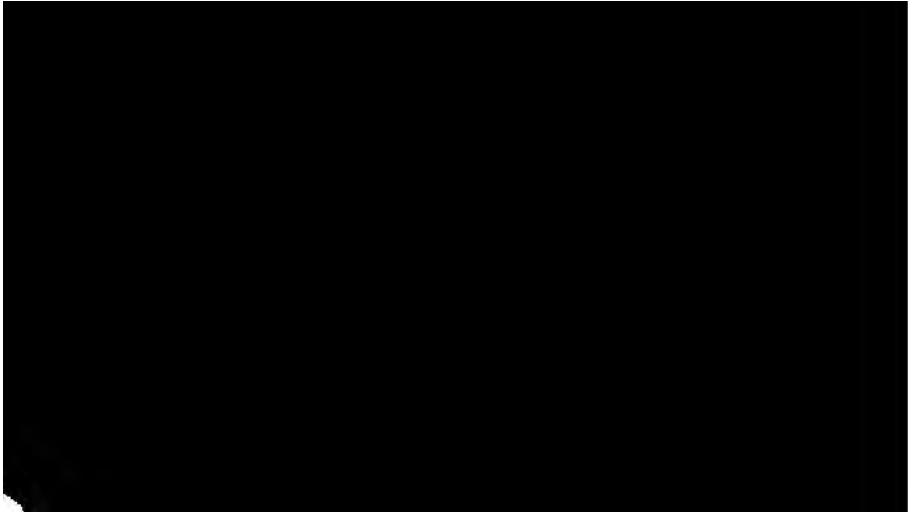
where the owner of the fee being the absolute owner of the land, and of the machinery erected upon it, the whole of it is in him, and he may dispose of it as he shall think fit for the benefit of the family.

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Then with reference to the authorities by which we are bound; whatever speculative notions we might entertain with respect to propriety and expediency, if we entertained a different opinion upon that subject, all the cases are quite uniform both in England and in Scotland to shew that such property shall go to the heir. The only case the other way which has been referred to is that of the Cider-mill, where the essential circumstance is left entirely in doubt, whether, in fact, the mill was fixed to the freehold or not. We know that a cider-mill is not necessarily affixed to the freehold, a familiar instance of which is given in the Vicar of Wakefield, where, when a match was proposed between one of the Misses Primrose and young Farmer Flamstead, Moses said "I hope that, if my sister marries young Farmer Flamstead, he will lend us his cider-mill." I take it that the cider-mill there was moveable, and was not affixed to the freehold, but might have been carried from the farm of Farmer Flamstead to the vicarage of the Primroses. Now, this possibility was felt to be so strong on the part of the learned and able counsel who argued for the appellant, that they were almost driven to admit, that in this case, if the freehold had belonged by hereditary descent to Mr. *Dixon*, the machinery would have gone to his heir; but they said the land was purchased by him for the purposes of trade, and therefore, this introduced a new distinction. This was assuming that, if a great proprietor, such as Lord *Londonderry*, in the county of Durham, were to erect machinery in his coal works, that would go to the heir, and not to the executor; but that if a person bought a piece of land for the purpose of a colliery, and erected machinery upon it, his having bought it would make a distinction as to the character of the machinery. There

1845.
FISHER
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is not the slightest authority for any such distinction, and it would be most mischievous if we were at all to sanction the introduction of any such distinction. It would lead to great mischief and infinite litigation. There are cases where, as between partners, when land is used as part of the partnership stock, it is considered as personalty; but in those cases the land itself, the very soil, is by previous agreement declared to be part of the personalty, as well as any machinery erected upon it. The arguments that were urged in this case by the appellant would lead to the conclusion that all the land that was purchased in fee simple by Mr. *Dixon*, and belonged to him as long as grass shall grow and water run, must all be personalty just as much as the machinery erected upon the land. I have no doubt at all that the principle of the decision was perfectly correct. A distinction was attempted to be made between leasehold and freehold; but when we bear in mind, that, by the law of Scotland, leasehold is realty, and that it goes to the heir, that distinction entirely fails. I am of opinion, therefore, that the interlocutor must be affirmed. I am very glad, and I think it is creditable to the respondent, that he did not, for any minute pot-lid or miserable chattel, bring a cross appeal, because that would only have involved the case in fresh difficulty, and caused unnecessary expense. I therefore entirely agree in the



In the matter of HEAVISIDE's Divorce Bill.

A husband, immediately after his wife's elopement, brought an action and obtained a verdict for damages against the adulterer, and also proceeded against the wife in the Ecclesiastical Court, and obtained a divorce there, but did not for five years from the elopement apply for a divorce in Parliament.

The delay was held to be sufficiently accounted for by the absence of the wife in America, and by the inability of the husband, in consequence of his affliction, to attend to any business.

1845.
June 17.
Divorce.
Delay
explained.

On the day appointed for the second reading of the Bill, intituled "An Act to dissolve the marriage of *Richard Heaviside, Esq.*, with *Mary*, his now wife," &c.,

Mr. *Austin*, with whom was Mr. *Charles Beavan*, as counsel for the petitioner, opened the allegations of the bill.

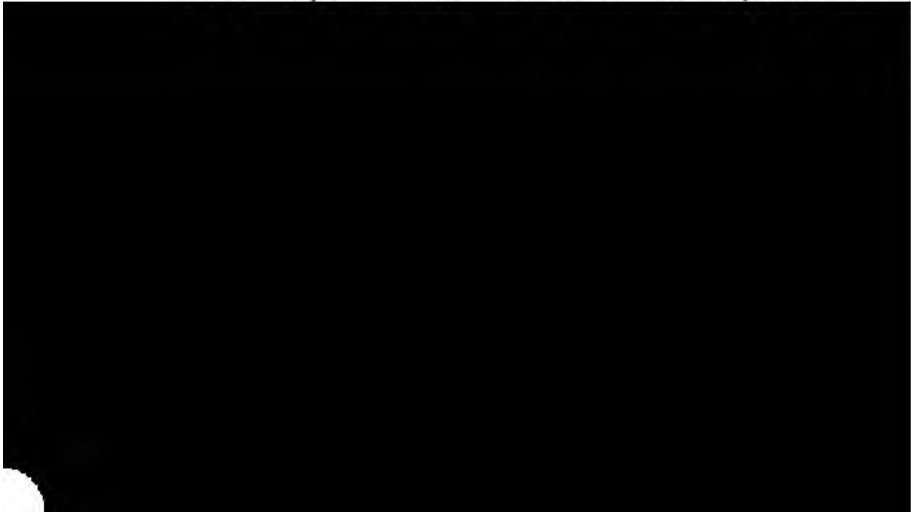
From his statement, and from the evidence, it appeared that Mr. *Heaviside* was married to Miss *Mary Spicer*, his first cousin, at *Bath*, in the month of *July*, 1824. They lived happily together, and had three children surviving. In *March*, 1840, Mrs. *Heaviside* eloped from her husband's house in *Brighton* with the Rev. *Dionisyus Lardner*; Mr. *Heaviside* brought an action against him for criminal conversation, and obtained a verdict, at the next ensuing summer assizes, for 8000*l.* damages, for which, and for the costs, judgment was duly entered up, but not executed in consequence of Dr. *Lardner* having left the country. Mr. *Heaviside* also took immediate proceedings against his wife in the Ecclesiastical Court, and obtained a definitive sentence of divorce *à mensa et thoro*, but took no steps to sue for a divorce in Parliament until the present month (*June*, 1845).

1845.
HEAVISIDE'S
Divorce.

The reason given for this delay by the counsel was, that Mr. *Heaviside*, having heard that his wife and Dr. *Lardner* had gone to *America* in the beginning of the year 1841, and believing that they intended to reside there permanently, did not think it necessary to sue for a parliamentary divorce; but now finding that they had arrived in *France* from *America*, and were within reach of process, and apprehending also that they might come to *England*, he was induced, for the protection of himself and his legitimate children against a spurious issue, to apply for the divorce.

The reason given for the delay by one of the witnesses (uncle to the lady, and to Mr. *Heaviside* also) was, that “Mr. *Heaviside's* mind was so upset, he was so completely beaten down with his misfortunes, that he had not resolution to think of any thing, or to do any thing, for years; and it was not till the witness urged him to appeal to this House that he would hear of it at all, and then witness put it upon the footing of his children growing up and coming out in life, and that it would be a great misfortune to them to have a mother so situated, and that the better plan would be to obtain a divorce if he could.”

It was from this witness that Mr. *Heaviside* learned that his wife and Dr. *Lardner* had arrived from *America* at *Havre*, and thence went to *Paris* on the 7th of this



House and from Divorce Acts a great number of cases, in which the delay had been longer, and not so well, nor at all, accounted for. By his favour, the following cases have been selected :—

1845.

THOROTON'S Divorce Act (39 Geo. 3, c. 78).

*Divorce Acts.
Delay, no
objection.*

The adultery was in 1795 ; a verdict and judgment were obtained in an action for damages against the adulterer the same year ; the act was applied for and passed in 1799. The delay was not accounted for.

See 42 Lords' Journ., p. 174 ; and the Act.

CAMPBELL'S Divorce (39 Geo. 3, c. 103).

The adultery was in 1788 ; the husband was then in India ; he returned to England, and brought his action, and got a verdict for damages against the adulterer in 1792 ; and proceeded for a divorce in the Ecclesiastical Court in 1796. There was an appeal in that suit ; the Divorce Act was applied for, and passed in *July*, 1799.

42 Lords' Journ., p. 129 ; and the Act.

TIGHE'S Divorce (44 Geo. 3, c. 68).

The adultery was, or was discovered, in 1799, and an action was then brought against the adulterer and a verdict obtained. The act was applied for, and passed in *July*, 1804. No reason was given for the delay.

44 Lords' Journ., pp. 585 and 613 ; and the Act.

MASSY'S Divorce (48 Geo. 3, c. 76).

The wife's elopement was in January, 1804, immediately followed by an action in which a verdict was obtained against the adulterer. The Divorce Act was passed in June, 1808. The delay was not accounted for.

46 Lords' Journ., pp. 688, 705, and 789 ; and the Act.

1845.

LORD CLONCURRY'S Divorce Act (51 Geo. 3, c. 73).

Divorce Acts.
Delay, no
objection.

The adultery was discovered in May, 1806 ; the act was passed in 1811 ; and no reason given for the delay.
48 Lords' Journ., p. 90 ; Macqueen's Parl. Div. 607 ; and the Act.

BEST'S Divorce (54 Geo. 3, c. 49).

The adultery was discovered in July, 1808 ; an action for criminal conversation was brought in the same year, and a suit in the Ecclesiastical Court in 1813 ; the Parliamentary Divorce Act was passed in June, 1814.
49 Lords' Journ., pp. 815, 896, 990 ; and the Act.

BLOXAM'S Divorce (54 Geo. 3, c. 47).

The discovery of the adultery was in August, 1804 ; the act was passed in June, 1814. No reason was given for the delay.
49 Lords' Journ., pp. 846, 990 ; and the Act.

LEIGH'S Divorce (58 Geo. 3, c. 57).

The discovery of the adultery was in 1811 ; the husband was in prison in France ; he returned to England in 1814, in poverty ; the act was passed in 1818.
51 Lords' Journ., p. 498 ; Macqueen's Parl. Div. 623.



Mrs. TURTON's Divorce Act (1 & 2 W. 4, c. 35).

1845.

The adultery by the husband, relied on, took place on his voyage to India in 1822; Mrs. Turton returned to England in 1824; the act was applied for and passed in 1830-1. See 63 Lords' Journ., pp. 781, 824; Macqueen's Parl. Div. 657.

Divorce Acts.
Delay, no objection.

ALLAN's Divorce (4 & 5 W. 4, c. 41).

The wife's adultery took place as she was coming from India in 1826; the act was applied for and passed in 1834. 66 Lords' Journ., Appendix, 368; and the Act.

COODE's Divorce (2 & 3 Vict. c. 54).

The wife was delivered of an illegitimate child in March, 1830, and in the month of October following the husband came to England and inquired into the matter; the act was passed in 1839. The delay was not accounted for. 71 Lords' Journ., App. 626. See 6 Clark & Fin. 567.

The Rev. Dr. LARDNER's Divorce (2 & 3 Vict. c. 53).

The adultery of the wife was in 1820, but was not known to Dr. Lardner until 1830, when the adulterer was dead. A suit was instituted in the Ecclesiastical Court in 1832; the Divorce Act was passed in 1839. There was some evidence of Dr. Lardner's poverty to account for the delay. 71 Lords' Journ., App. 663. See 6 Clark & Fin. 569.

MELLIN's Divorce (2 & 3 Vict. c. 59).

The adultery was in 1835; the act was passed in 1839. 71 Lords' Journ., App. p. 670; and the Act.

WYATT's Divorce (4 & 5 Vict. c. 56).

The wife quitted her husband in India in 1825, and was found living with the adulterer in England in 1833; the act was passed in 1841. There was evidence of the husband's inability to come to England. 72 Lords' Journ., App. p. 92; and the Act.

1845.

Divorce Acts.
Delay, no
objection.

WARR's Divorce Act (3 & 4 Vict. c. 50).

The separation of the husband and wife was in 1827 ; the adultery of the wife in 1829. She was convicted of bigamy, and had a child in prison in 1831. There was no action at law, nor suit in the Ecclesiastical Court ; the Divorce Act was passed in 1840. There was evidence of the husband's poverty till 1832, but that he was in good circumstances from that time.

See 72 Lords' Journ., Appendix, 313, *et seq.* ; and the Act.

 DEANE's Divorce (3 & 4 Vict. c. 49).

The adultery was in 1829 ; the Divorce Act was passed in 1840. There was here, also, some evidence of the husband's poverty to account for the delay.

72 Lords' Journ., App. 322 ; and the Act.

 CLOSE's Divorce (3 & 4 Vict. c. 52).

23d October, 1834, Mr. Close went away. The wife's adultery was in 1835 ; the action for criminal conversation was in 1838. The delay of the action was put on the ground that the defendant could not be found. The act was passed in 1840.

72 Lords' Journ., App. 339 ; and the Act.

The Divorce Acts, above referred to, are not printed with the statutes, either general or local and personal ; but they are printed with Naturalization and Estate Acts, and a collection of

In the matter of SIMMONS' Divorce Bill.

1845.

June 23, 26;
July 7.
Divorce.
Husband's
Conduct.

A husband lived separate from his wife for many years, without making any provision for her maintenance from his means, which were sufficient :

Held not to be entitled to a divorce, though the adultery of the wife was clearly proved.

On the day appointed for the second reading of the bill, intituled "An Act to dissolve the Marriage of *Charles Simmons* with *Frances Fanny*, his now wife," &c.,

Mr. *Austin*, counsel for the petitioner, in opening the allegations of the bill, stated a case of common prostitution against the wife, observing that on that account the husband was unable to bring an action of damages for the adultery against any person (*a*).

It appeared from the evidence given in support of the allegations in the bill, that the parties were married by licence at *Great Milton, Oxfordshire*, in the year 1825, the husband being then an apprentice to a baker, and only seventeen years of age, the woman being twenty-five, and representing herself to be wealthy. They separated after six months' cohabitation, and the husband became valet to a Mr. *Heneage* in *London*, subsequently kept a gin-shop in *Westminster*, and lastly and still an inn at *Thame* in *Oxfordshire*. A woman named *Ann Keeling*, who had been his fellow servant at Mr. *Heneage's*, became his housekeeper in the gin-shop, and continued still with him in that capacity; and he kept three other servants. In the beginning of the year 1844, he set persons to watch his wife's conduct, and those persons, in their examina

(a) See *Coode's Divorce*, 6 Clark & F., 567.

1845.
SIMMONS'
Divorce.

tion at the bar, proved a clear case of street-walking and prostitution against her.

Mrs. *Simmons* having attended at the bar, and cross-examined the witnesses, undertook, if the House would give her time, to produce witnesses who would prove that the husband had been living in adultery with *Ann Keeling* for sixteen years. A week was granted to her for that purpose.

On the appointed day she produced two witnesses; the first, the son of the said Mr. *Heneage*, said he remembered the husband *Simmons* when he was valet to his father thirteen years ago. He passed as a single man, and there was a report that he was then cohabiting with *Ann Keeling*, his fellow servant. It was reported also that he had deserted his wife; and he himself (witness), after much inquiry, found the wife in *Mary-le-bone* parish in great distress, but bearing an irreproachable character. He reported the matter to the parish authorities, who arrested the husband, but what further took place witness knew not.

The other witness was *Augusta Simmons*, who said she was the daughter of Mrs. *Simmons* by the petitioner, and sixteen years of age. The parish officers took herself and her mother over to *Thame* to her father's inn, and he refused to take them in. *Ann Keeling* was there, and

Mr. *Simmons*, the husband, was presented at the bar to answer any questions the House might be pleased to put to him. After answering some questions put to him by a Peer, who told him he was at liberty to make any statement he pleased in answer to the imputations made against him and *Ann Keeling*, he was proceeding to make such statement ;—

1845.
 }
 SIMMONS'
 Divorce.

Lord *Campbell* interposed, and said that, according to the standing order, No. 142, and to the usage of the House, the only questions that could be put to the husband, petitioning for a divorce act, were these: “ Whether there has been any collusion, directly or indirectly, on his part relative to any act of adultery that may have been committed by his wife ; or whether there be any collusion, directly or indirectly, between him and his wife, or any other person or persons, touching the said bill of divorce, or touching any proceedings or sentence of divorce had in the Ecclesiastical Court at his suit, or touching any action at law which may have been brought by such petitioner against any person for criminal conversation with the petitioner’s wife ; and also, whether, at the time of the adultery of which such petitioner complains, his wife was, by deed or otherwise, by his consent living separate and apart from him, and released by him, as far as in him lies, from her conjugal duty, or whether she was at the time of such adultery cohabiting with him, and under the protection and authority of him as her husband.”

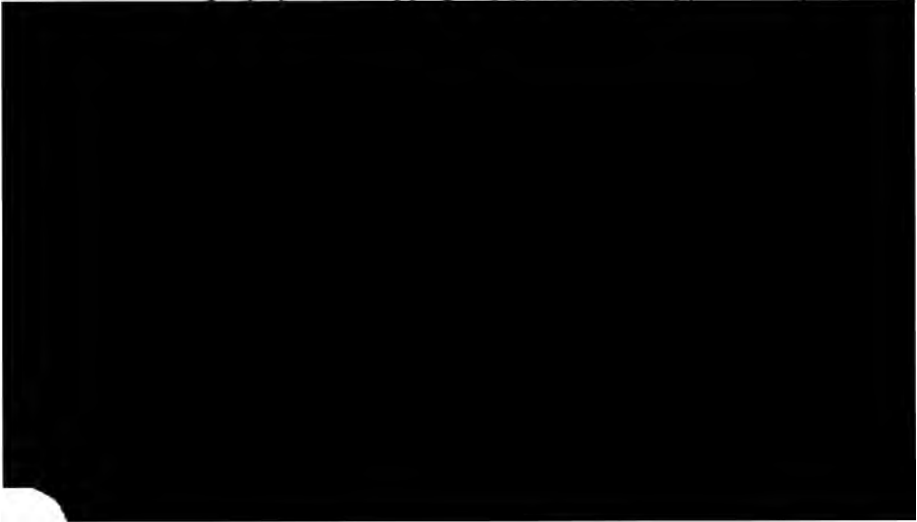
No question was put to the husband.

Lord *Brougham* said, that upon the evidence which their Lordships had heard in this case, the petitioner was not entitled to the relief which he had prayed for. Their Lordships could not entertain any doubt of the wife’s adultery, but they were to look to her husband’s conduct also, and say whether that did not disentitle him to any relief. He might or might not be guilty of criminal cohabitation with

1845.
SIMMONS'
Divorce.

Ann Keeling, and she may be as respectable and as well conducted as any other woman; it was not on the ground of adultery with her that he (Lord *Brougham*) would move their Lordships to reject this bill; but it was for his conduct to his wife, having separated himself from her more than sixteen years without looking after her, without making any provision for her maintenance, without allowing her one farthing, while, as it appeared by the evidence, he was in very good circumstances, having three or four servants in the conduct of his business, and allowing them good wages—one of them so much as 40*l.* a-year. His Lordship, in moving that the bill be read a second time that day three months, repeated, and he wished it to be clearly understood, that he did so, not on the ground of the husband's adultery with *Ann Keeling*, but—wholly independent of that charge, and as if there was no ground whatsoever for it—on the evidence that this person neglected his wife, and threw her on the world without caring what became of her, or how she was supported, or allowing her anything towards her support.

Lord *Campbell* expressed his concurrence in the view taken by his noble and learned friend. Without considering whether the charge of recrimination was or was not made out, and even supposing *Ann Keeling* was per-



ALEXANDER HATFEILD	-	<i>Plaintiff in error.</i>	1845.
LAWRENCE PHILLIPS, S. PHILLIPS,	}	<i>Defendants in error.</i>	Feb. 18, 24 ; June 24, 30 ; July 1.
J. E. LARRIEU, LEWIS ROGERS,			
and W. GRAY			

A foreign owner of goods consigned them to a factor in London, to whom he indorsed the bill of lading in blank, and transmitted it, with instructions to receive and sell the goods. The factor received the goods, paid the freight and charges thereon, and entered them in his own name at the Custom House, by reason of which, and without the privity or express assent of the owner, he obtained a dock warrant, which he pledged for advances beyond the amount for which, as a factor, he had a lien on the goods ;—

Trover.
"Intrusting"
Factor's Act.

Held that, under these circumstances, he was not intrusted with the dock warrant within the meaning of the second section of the act 6 Geo. 4, c. 94.

There is a distinction between persons intrusted with goods, and with the documents, mentioned in that act.

An intrusting with the bill of lading, for the purpose of the sale of goods, is not an intrusting with the dock warrant which represents those goods, notwithstanding that the possession of the bill of lading enables the holder of it to obtain possession of the dock warrant.


THIS was an action of trover, originally brought by *Lawrence Phillips* and others, against *Alexander Hatfeild* and one *William Tomlin*, since deceased, for the conversion by the defendants of certain hogsheads of tobacco, and certain dock warrants belonging to the plaintiffs.

The defendants pleaded three pleas :—*First* ; Not guilty : *Secondly* ; That the plaintiffs were not possessed as of their own property of the said tobacco or dock warrants, upon both which pleas issues were joined : and, *Thirdly* ; That on the 12th of December, 1836, certain persons carrying on trade under the name and firm of

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HATFIELD
v.
PHILLIPS.

Warwick and Clagett, were intrusted with, and in possession of, certain dock warrants for the delivery to them, or their order, by indorsement thereon, of certain large quantities of tobacco, the same being the goods and warrants in the declaration mentioned: and *Warwick and Clagett* being so intrusted and in possession, &c., applied to, and requested the defendants to accept for them, *Warwick and Clagett*, three bills of exchange (which were fully set out in the plea): *Warwick and Clagett* at the same time proposed to the defendants, to deposit with the defendants the said dock warrants, and to pledge the same and the tobacco as a security for the bills of exchange. The plea then alleged the acceptance by the defendants of the bills of exchange, and set up the claim of the defendants to detain, as against the demand of the plaintiffs, the dock warrants and tobacco, by virtue of the aforesaid pledging thereof, by *Warwick and Clagett*. It then averred that the defendants had no notice that *Warwick and Clagett* were not the actual and *bonâ fide* owners of the dock warrants and tobacco, and alleged the payment of the bills by the defendants, and that the amount thereof had not been repaid to the defendants by *Warwick and Clagett*; verification. The plaintiffs replied *de injuriâ* to this plea. Issue thereon.

The cause was tried before Lord *Abinger*, at the London Sittings, after Trinity Term, 1840, and the plaintiffs gave



tions to *Warwick and Clagett* to take out dock warrants for this tobacco. The mode of selling tobacco warehoused in the London Docks, is by delivery order, or by dock warrants, at the option of the owner, and a dock warrant is not only unnecessary for the purpose of effecting a sale of tobacco, but where the quantity to be sold is large, as in the present case, is unusual and inconvenient. A person in whose name goods are entered at the docks, can obtain dock warrants or give delivery orders for them, at his option. The plaintiffs did not know till the 8th February, 1837, when *Warwick and Clagett* stopped payment, that any dock warrant had been taken out.

For the defendants, evidence was given to the following effect :—Before the ship containing the tobacco arrived, a bill of lading was forwarded by the plaintiffs to *Warwick and Clagett*, by which the tobacco was made deliverable to order or assigns, and which was indorsed in blank. The bill of lading was inclosed in a letter from the plaintiffs to Mr. *Warwick*, which letter contained the following directions : “ You will, in the disposition of this tobacco, be governed by the direction of our Mr. *Lewis Rogers* of Havre, to whom, by agreement, the parties have committed the charge. You will place the proceeds of sales to our credit, or account to our Mr. *Rogers* for same, as may be agreed upon by you and him.” On the arrival of the ship, the tobacco was landed and warehoused by *Warwick and Clagett*, in their own names, and they paid the freight and charges thereon. On the 12th of December, 1836, *Warwick and Clagett* applied to the defendants to lend them a large sum of money upon the security of dock warrants, and on the same day, and whilst the negotiation was pending, took out a dock warrant for the tobacco in question (as well as for a large quantity of other tobacco not belonging to the plaintiffs), for the purpose of pledging this dock warrant with the defendants as a security for the advance of the said sum of money. The advance was made on the security of the dock warrant,

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which was delivered, having been first indorsed in blank by *Warwick and Clagett*, to the defendants.

Upon this evidence, the only question which arose at the trial was, whether *Warwick and Clagett* had or had not been intrusted with the dock warrant, within the meaning of the second section of the Factors' Act, 6 Geo. 4, c. 94 (a). For the defendants, it was contended that the said tobacco being consigned to *Warwick and Clagett* for sale, and they having the possession of the bill of lading, and having thereby the means of obtaining dock warrants, must, as a necessary conclusion of law, be considered authorised to take out such dock warrant, and intrusted with the dock warrant, within the meaning of the statute. The defendants required the Lord Chief

(a) By the second section of which it is enacted, "That any person or persons intrusted with or in possession of any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant, or order for delivery of goods, shall be deemed and taken to be the true owner or owners of the goods, wares, and merchandise, described and mentioned in the said several documents hereinbefore stated respectively, or either of them, so far as to give validity to any contract or agreement to be made or entered into by such person or persons so intrusted and in possession, as aforesaid, with any person or persons, body or bodies, politic or corporate, for the sale or disposition of the said goods, wares, and merchandise, or any

Baron to direct the jury that the matters so given in evidence for the defendants established conclusively, as a matter of law, that the said *Warwick and Clagett* were intrusted with and in possession of the said dock warrant, and to bar the plaintiffs of their action. But the Lord Chief Baron stated his opinion to the jurors, that upon the issue joined in that record they had to try whether or not *Warwick and Clagett*, who pledged the goods, were intrusted by the plaintiffs with the dock warrant; that if they were, then the defendants were entitled to a verdict; if they were not, that then they were not so entitled; that a man once intrusted with a bill of lading, was not, therefore, intrusted with all he might do by means of that bill of lading; that it was not a legal inference from the fact that a man was intrusted with a bill of lading, that he thereby became intrusted with all the other documents which the possession of the bill of lading might enable him to obtain; nor did the possession of the bill of lading, as a matter of law, show that he was intrusted with the dock warrant; that this was not an inference of law, but one of fact, and that the jurors would consider whether they could draw that inference in this case. His Lordship, after commenting at length on the facts of the case, and explaining to the jury by example what would amount to an intrusting, in point of fact, stated that the mere possession of the bill of lading did not, as a matter of law, authorise *Warwick and Clagett* to take out this dock warrant; that the argument of the defendants' counsel seemed to be, that they were intrusted with the bill of lading, and therefore they were intrusted by implication with all that the possession of the bill of lading or of the goods might enable them to do, but that he did not agree to that as a matter of law. His Lordship then left it to the jury to say whether, upon the whole evidence, the plaintiffs did intrust *Warwick and Clagett* with the dock warrant they obtained; if not, the plaintiffs would be entitled to the verdict; but if the

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jurors were of opinion that, in point of fact, *Warwick and Clagett* were so intrusted, then the defendants would be entitled to the verdict. The counsel for the defendants required the Chief Baron to state to the jury what, in point of law, was an intrusting with a dock warrant within the meaning of the 6 Geo. 4, c. 94, s. 2, which he declined to do, on the ground that it was not an inference of law, but was a matter of fact; and he further stated, that he considered that the intrusting must be with the privity and consent of the person supposed to intrust, expressed or implied. The jury found for the plaintiffs on all the issues, and assessed the damages at 10,589*l.* 16*s.* 4*d.* A bill of exceptions was tendered and sealed, and judgment was signed in the Court of Exchequer in Michaelmas Term, 1840.

Error having been brought in the Court of Exchequer Chamber upon the bill of exceptions, the case was argued on the 13th and 14th December, 1841 (*b*). The Court took time to consider the judgment, and on the 21st February, 1842, Lord *Denman* delivered the unanimous judgment of the Court, affirming that of the Court of Exchequer (*c*). The present writ of error was then brought.

The arguments in this case were begun in February, but after the case had been part heard, they were sus-

...del and the case was ordered to be argued before

well; and Barons *Parke*, *Alderson*, *Rolfe*, and *Platt*, attended.

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Mr. *Kelly* and Mr. *Wortley* (Sir *J. Bayley* was with them) for the plaintiff in error:—

The greatest difficulty in this case arises from the simple fact, that the judgment of a Court has already put a construction on the 6 Geo. 4, c. 94. But it is submitted that, when that statute comes to be examined, its terms, though not perhaps perfectly clear, will not bear out that construction. A bill of lading makes the goods deliverable to order, or, in other words, to the assignee of the party who holds it. In this case there was an assignment by an unqualified bill of lading, which vested in the holder of that instrument the right to the possession of the goods. The tobacco here was consigned for the purpose of sale. *Warwick and Clagett* were to sell it: they were not only factors but were themselves merchants, and when, therefore, the tobacco arrived it was warehoused in their names. The bill of lading then became a dead letter; it was *functus officii*. These persons were in the same manner, and for the same purpose, consignees of tobacco belonging to other persons besides the plaintiffs: they were the consignees of the whole cargo, and they, therefore, took out a dock warrant, which is the usual course when the whole cargo and not merely a part of it is intended to be sold. The delivery order is taken out when only a part of the cargo is to be disposed of. The course pursued in this case was, therefore, justified in every way by the circumstances of the consignment. To all the world Messrs. *Warwick and Clagett* appeared to be the owners of the tobacco, entitled to sell it, and acting as if such was their intention. On the day on which they took out the delivery orders, they pledged the dock warrants to *Hatfield and Co.* for a large advance of money. It is not suggested

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that these persons had any knowledge that *Warwick and Clagett* were not the true owners of the tobacco. Under these circumstances, the question is, whether the plaintiffs, the consignors from abroad, by intrusting *Warwick and Clagett* with these goods for the purpose of sale, must not be taken to have intrusted them with either the dock warrant or the delivery orders. Into one or the other of these the bill of lading must have been transmuted for the purpose of doing that which the consignors intended when they sent the goods to this country—namely, selling them to a *bonâ fide* purchaser. No sale could have been carried into effect without such a change in the symbol of the property. It must, therefore, be admitted, that *Warwick and Clagett* were intrusted with the bill of lading for the purpose of making this change. (*The Lord Chancellor*.—Is not the question this—whether the delivery of the bill of lading is an evidence of intrusting with the dock warrants.) It is something more. As the consignment was for the purposes of sale, and as a sale can only be effected by a dock warrant or a delivery order, the question is, whether the intrusting with the bill of lading was not an intrusting for the purpose of an absolute disposal of the goods.

The cases on this matter are not numerous. The first in point of date is that of *Paterson v. Tush (d)*, which



sale or for pledge—with a restricted or with an unlimited authority. Yet, without a knowledge of what was the fact in that respect, the judgment is incapable of a just application. Still it may be admitted, that that case was long acquiesced in, and decisions were founded upon it; but, at the same time, it was so opposed to the usage of trade, that there was a great struggle perpetually going on between commercial practice and law upon this very matter. At length the Legislature altered the law, and the plaintiff in error may safely admit the force and authority of the previous decisions, since the fact of that alteration shews that no one of them can apply to him.

(*The Lord Chancellor*.—As I understand this case in the Court below (e), it decides that possession of the bill of lading is not sufficient to give the factor a power over the goods; that there must be an intrusting with the symbol of the goods, the dock warrant, or delivery order, and that whether there is an intrusting or not, is a question of fact for the jury. There is one other question—namely, whether employing a factor to sell, and delivering to him a bill of lading, by means of which he may obtain possession of the dock warrants, by which a sale can be completed by delivery, is to be considered an intrusting him with the dock warrants).

That is the main question here, and the plaintiff in error upon that question contends, that where a foreign consignor consigns goods to a factor in this country, by bills of lading indorsed in blank, and so consigns them for the purposes of sale, he does intrust the consignee not merely with the bill of lading, but with whatever will enable him to get possession of the goods, and consequently intrusts him with the goods themselves. The words of the second section of the 6 Geo. 4, c. 94, do not seem doubtful upon this point. A person who, by the

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act of the consignor and by his representations, acquires absolutely a power of disposing of the goods, and of every description of document which can represent them, must be said to be intrusted with the documents and with the goods. To say, under such circumstances, that the factor is not intrusted by the owner, is to defeat the object of the statute, and to enable the owner of the goods, or the factor, or both together, to commit frauds without limit upon persons whom the Legislature intended to take under its protection. A bill of lading sent to a factor in the form adopted in this case, gives him the actual power to dispose of the goods. (*The Lord Chancellor*.—The moment the goods were delivered the bill of lading had done its office, and there was an end of that; could the factors pledge the specific goods? They had instructions to sell; could they sell without obtaining a dock warrant or a delivery order? No; they must have one or the other, unless they went out of the usual course of business. (*The Lord Chancellor*.—According to the usual course of trade, were they to wait for particular orders to sell?) They were not. (*The Lord Chancellor*.—When a party gives general instructions to sell, he gives instructions to do all that is necessary for that purpose. Might the factor then at once get the dock warrant or the delivery order, and if he did so, might he pledge it?)

advisable to have frequent recurrence to the parties in Europe as to the mode and time of selling this tobacco. [Lord *Brougham*.—The letter is strong: “You will be directed by Mr. *Rogers*, to whom, by agreement, the parties have intrusted the charge.” *The Lord Chancellor*.—Suppose *Rogers* had said “The market is very bad with you just now, send the cargoes over to Havre,” he must have done it. This case is not, therefore, like the simple case of sending goods with a bill of lading, and desiring a sale, for that would be a general authority to sell; but here the factor is to wait for the directions of Mr. *Rogers*. The factor is to get possession of the goods by the bill of lading, but having done that, he is not to do anything else except upon directions from a third person.] That is not quite what is meant. If he got directions from *Rogers*, he was to obey them; but if he did not, he was at liberty to act without them. But assuming it to be (which it was not) an absolute prohibition on the part of the consignors to sell the goods without the consent of Mr. *Rogers*, that would not be any prohibition against taking them for the purpose of pledging. And at all events, whatever might be the private arrangements between the parties themselves, the factors here were publicly invested with the possession of the goods, and with the authority to deal with them. They were therefore in the situation in which the statute protected those who dealt with them. They were “entrusted with and in possession of the bill of lading.” The statute meant that the lender of money, lent on such security as this, should not be bound to enquire whether the man who appeared to have possession of the goods was or was not legally as against all the world entitled to that possession. [*The Lord Chancellor*.—The object of the statute was to protect the owner of the goods; but at the same time it said to him, if you entrust a man with them you must take the consequences of so entrusting him. The question is, was there any en-

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trusting?} There was in this case; the general nature of the authority given shews this. [*The Lord Chancellor*.—But suppose the owner sends a bill of lading with instructions to the factor not to sell the goods for six months, he would have authority to get the goods but not to dispose of them.] That supposition seems to confound authority with power—the authority to get the goods, with the power to dispose of them. The owner might send the bill of lading, and yet order the factor not to possess himself of the goods for a limited time. In that way the factor would not have the means or power of getting the goods. [*The Lord Chancellor*.—But he might get the goods, and yet not have the power of dealing with them. I do not think that he is entrusted merely because he has the power to do what the owners have ordered him not to do.] But the authority to sell and the power to sell must not be confounded, at least not where the interests of third parties are to be affected. Here the factors were entrusted with the power. They received the bill of lading which gave them an absolute power over the goods. It was not for third parties to ask whether they were authorised to exercise that power. [*The Lord Chancellor*.—But, as was well argued by Mr. *Crompton* in the Court of Exchequer in the first case arising out of these transactions (*f*), “A mere enabling is not an entrusting. Suppose I give a

principal. The Legislature so deemed it, and for the protection of third parties, intended to put on the same footing as well pledges of the symbols of goods as pledges of the goods themselves.

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Whenever a factor is entrusted with the bill of lading, and with the symbols of the goods, he is entrusted with the goods themselves. It was well known to the framers of the statute, that the goods themselves were never pledged except by the pledge of the instruments that were the symbols of them; and therefore the statute only uses words which indicate a dealing with the goods by means of the instruments which are the symbols of the goods. And here it is to be observed that the authority is not limited to the bill of lading; for the trust which the sending of that document implies has not expired, but still continues, though the direct effect of the bill of lading may have been satisfied by the landing of the goods.

In this case *Warwick and Claggett* were the factors of the owners of the goods. That very character of itself implies that they were entrusted with the goods. A factor is a trustee for his principal, *Mace v. Cadell* (g). In *Martini v. Coles* (h), Lord *Ellenborough* treats him as a person to whom are confided the goods and the affairs of the principal. *Bell*, in his "Commentaries on the Laws of Scotland" (i), adopts the same doctrine, and shews that a factor is distinguished from a broker by being entrusted with goods as if they were his own.

Crawshay v. Thornton (k) shews the manner in which the Courts of Equity treat a factor. That was an application in an interpleader suit; and it was held, that where the factor had declared that he held goods at the disposal of C., he could not afterwards, when the goods were claimed by D., maintain a bill of interpleader against C. and D.


(g) Per Lord *Mansfield*, (i) Vol. I., p. 195, *et seq.*,
Cowp. 232. 385, *et seq.*

(h) 1 Maule & Selw. 140. (k) 2 Myl. & Cr. 1.

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The rule in that case was founded on *Stodart v. Dunken* (l), the principle of which was recognized in *Hawes v. Watson* (m), and is justified by the authority of *Pickering v. Busk* (n).

The supposition in the Court below was that the Legislature did not intend to protect the pledging of goods because they could not be ear-marked, and only meant to extend the provisions of the statute to the pledging of the symbols of goods. This is an erroneous view of the statute, and of the intention of the Legislature. That intention was to protect merchants and others who should enter into contracts with the apparent owners of goods—persons who had been entrusted by the real owners with the apparent ownership of these goods, and who by means of that trust were able to obtain contracts and to gain credit—credit which was given in consequence of this apparent possession of the goods. To put a proper construction on an act of Parliament, supposing it capable of bearing more than one construction, the previous state of the law ought to be considered, and attention ought to be directed to the question—what was the evil which that state of the law permitted, and which, therefore, required to be remedied. Applying that rule to the task of construing this statute, its meaning will be plain. Goods of immense value are daily consigned by owners abroad to a



the trust then is of the goods themselves. The goods remain in the docks, the dock warrant is the acknowledgment of the Dock Company that the goods are held for the holder of that warrant, the possession of which, if the goods were consumed by fire, would enable those possessed of it to recover from the Insurance Office. On goods, the title to which is thus in the hands of a particular individual, money is advanced without hesitation. It is equally the interest of the owner and the factor, that advances thus made should be protected, and though frauds may possibly in some instances be practised, yet if it was not in the power of a possessor of goods to raise money on them in this manner, many transactions of great importance could not be carried on.

It is clear that it was the intention of the Legislature to protect all such pledges, whether of the symbols of the goods or of the goods themselves. Has that intention been carried into effect? It is submitted that that question must be answered in the affirmative. Goods and the symbols of them are in the act treated as the same things. The first section provides that foreign consignees, or persons entrusted, for the purposes of consignment or of sale, with any goods shall be treated as the true owners of the goods so far as to protect consignees for advances made upon them. This section shews that the Legislature did not intend to make any distinction between goods and the symbols of them, but to subject both to the same liabilities. Lord *Abinger's* argument for the supposed distinction, namely, that the goods cannot be ear-marked is not one which need be discussed; for the words of the statute do not shew that any distinction was made between the goods and their symbols.

The Legislature, it is true, speaks of the entrusting, in that section alone in which it refers to the documents as the symbols of the goods; but from the whole context of the clauses, it is manifest that it speaks of the goods by means of speaking of the documents.

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Assuming it to be established that the goods themselves are entrusted to the factor, he had clearly the right to pledge the documents which represented them. Where such a trust is created under circumstances which shew that with reference to the state of the law the factor becomes entitled to the documents which represent the goods, so that it may be his duty to create those documents, it cannot be said that he is not entrusted with those documents themselves. Such was the case here, and *Warwick and Claggett* must be treated as entrusted with the dock warrants which they were entitled, nay bound, to call into existence for the very purpose of dealing with the goods in the manner directed by their principal. The fact, that the mode in which *Warwick and Claggett* dealt with those documents was a fraud upon their principals, (supposing it to be so,) cannot affect the question of their having been entrusted with the documents. The Judges in the Court below allowed this fact to be relied on as a proof that there had been no entrusting. But that was an error. It was deciding the question of the right to a power by the circumstance of its abuse. The circumstance that the documents were created by a fraud did not shew that the factors were not entitled to create them. Suppose the statute had spoken of men entrusted with Bank notes, would not a man who received

The effect of the section is, that the factor, who has a lien on the goods, may pledge either the goods themselves, or any documents representing these goods, for the amount of his lien. If that is so, it is impossible to escape from this consequence, that the lender of the money, whether on the documents or on the goods, lends it at his own peril as to the amount, for he knows that he can only retain the goods to the amount of the lien. The fraud, therefore, can only be a fraud on the lender. *Warwick and Clagett*, the goods being in the docks in their names, were entrusted with the goods, and they were at least entitled to pledge the goods to the amount which they had advanced for freight and other charges, for which it is perfectly clear that they had a lien. For the purpose of pledging the goods a dock warrant was necessary. They had, therefore, a legal right to a dock warrant in respect of their lien on the goods. The document and the creation of it might consequently be lawful, and that being so, the secret intention of the factor to abuse the legal right cannot, as to a third party, render his creation of that document unlawful. The question, in fact, is not a question of the right to pledge, but of the right of lien, and, so far as the interests of an innocent party are to be effected, that right is complete.

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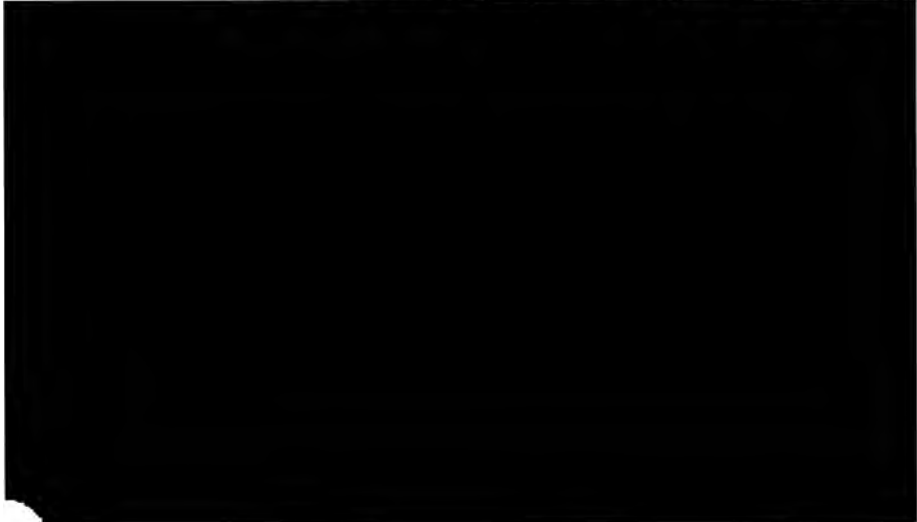
Mr. *Jervis*, Mr. *Crompton*, and Mr. *Waddington* appeared for the defendants in error, but were not called upon to address the House.

The Lord Chancellor.—We have advised with the learned Judges upon this subject, and do not think it necessary to hear the counsel on the part of the defendants in error. Their Lordships are now, I believe, prepared to favour us with their view of the case. The question to be submitted to the Judges is in these terms:—"A., residing abroad, being the owner of goods, consigned them by a bill of

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lading, making them deliverable in London to the consignee, or his assigns; and, having indorsed the bill of lading in blank, transmitted it to his factor, with instructions to receive and sell the goods. The factor receives the goods, enters them in his own name at the Custom House, and obtains, without the privity or express consent of the owner (by reason of the goods being entered in his own name at the Custom House), a dock warrant, in his own name, it being the usage at the docks to give such document to the person in whose name they are entered, and pledges such dock warrant for advances beyond the charges for which the factor has a lien. Is it a consequence of law under these circumstances that the factor was entrusted with the dock warrant within the meaning of the act of Parliament, 6 Geo. 4, c. 94, s. 2?"

Lord Chief Justice *Tindal* delivered the opinion of the Judges:—I am requested by my brethren to state our opinion, upon the question now put by your Lordships, to be, that, under the circumstances supposed by that question, it is not a consequence of law that the factor was entrusted with the dock warrant within the meaning of the act of Parliament 6 Geo. 4, c. 94, s. 2. For we consider the proper interpretation of that section to require that there should be not only a possession by the factor of the



nity, if he had thought proper to exercise it, of giving notice to the world upon the face of the document, or otherwise, that he did intend to allow it to be parted with in any other manner than for his own use. The statute enables the factor to pledge the goods to the extent of his own lien or interest, but he cannot give a greater interest than he has himself, except by the production of a document, and he cannot do that unless he is entrusted with that document by the owner. The circumstances supposed by your Lordships' question, appear to us to furnish no other conclusion than that the owner of the goods, by transmitting the bill of lading endorsed in blank to the factor, enabled him in the usual course to obtain the possession of the goods, but that they furnish no conclusion in law in determining the question, Whether the factor was entrusted with the dock warrant, which he obtained by means of having procured the goods to be warehoused in his own name.

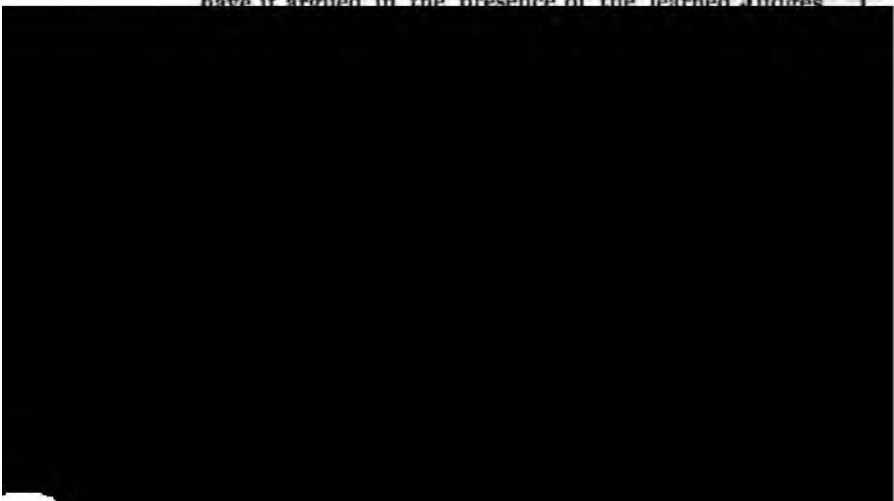
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The Lord Chancellor.—I entirely agree with the opinion which has been so well expressed by the learned Lord Chief Justice. Messrs. *Warwick and Clagett* were the consignees of the goods, they were entrusted with the bill of lading, and, as entrusted with the bill of lading, they were also entrusted with the possession of the goods, and had all the rights incident to that possession, the right to pledge the goods to the extent of any lien they had upon them being one. The Legislature has drawn a distinction between persons entrusted with the possession of goods and persons entrusted with those documents which are mentioned in the act, documents which, among merchants, are considered as evidence of title, and pass by indorsement from one person to another. The Legislature intended to draw a distinction between the two, and if we were to hold that a person entrusted with the possession of goods, or with the bill of lading, which enabled him to get possession of them, was, as a matter of course, to be con-

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sidered as entrusted with the dock warrant or other instrument mentioned in the act of Parliament, there would be an end of this distinction. I, therefore, think that the opinion of the learned Judge is correct—viz. that the party entrusted with the bill of lading for the purpose of sale, is not, in consequence of being so entrusted, to be considered as entrusted with the dock warrant, notwithstanding that his possession of the bill of lading and of the goods under it, enables him to obtain the dock warrant. I am, therefore, of opinion that the summing up of the learned Judge in this respect was correct, and that the exceptions cannot be maintained, and I propose that your Lordships' judgment shall be given for the defendant in error.

Lord Brougham.—My Lords, that is the opinion which I entirely, throughout the arguments, both now and upon the former occasion, arrived at in considering the case. We heard part of the arguments in the absence of my noble and learned friend on the woolsack, and we thought there was a disposition and, in fact, a necessity on the part of the plaintiff in error to contest the opinion of almost all the learned Judges who had given their opinions upon the subject, and that it was necessary, therefore, to hear it argued over again, and that we should delay the further consideration of the question, and have it argued in the presence of the learned Judges. I



In the matter of SHULDHAM's Divorce Bill.

1845.

August 1.

*Divorce.
Neglect
charged by
the wife.*

In prosecuting a Divorce Bill, a letter written by the wife, admitting her adultery, but imputing the blame to her husband for neglecting her and exposing her to temptation, is to be regarded more as an excuse invented to palliate her guilt than as founded in truth, and, therefore, does not require strong rebutting evidence.

The husband's attendance at the bar on the second reading of his bill for a divorce, in compliance with the standing order No. 142 (a), may be dispensed with, on petition of his attorney shewing reasonable grounds for his non-attendance.

*Practice.
Standing
Orders.*

ON the day appointed for the second reading of the Bill, intituled "An Act to Dissolve the Marriage of *Thomas Henry Shuldham, Esq.*, with *Frances Arran Hamilton*, his now wife," &c.,

Mr. *Austin* and Mr. *Macqueen*, for the petitioner, examined numerous witnesses in support of the allegations in the bill. The record of a verdict for damages and a judgment thereon against the adulterer, in the Supreme Court at Fort-William, *Bengal*, and also a sentence of divorce in a suit against the wife in the Consistory Court of *London*, with the proceedings therein, had been previously laid upon the table of the House, in compliance with the standing orders.

It appeared, by the evidence of the witnesses, that the said marriage took place at *Winchester*, in March, 1834. Mr. *Shuldham* was a Captain in the 52d Regiment of *Bengal* Native Infantry, and his leave of absence expiring in

(a) See the purport of this order *ante*, p. 341.

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SHULDHAM'S
Divorce.

June, 1835, he proceeded with his wife and child to *India*. In 1836 he joined his regiment at *Nusseerabad*, where he and his wife lived on the most affectionate terms until *March*, 1838, when, in consequence of her ill-health, a change of climate became necessary. Mount *Aboo*, near *Erimpoorah*, about fifteen days' journey from *Nusseerabad*, having been recommended for its salubrity, Captain *Shuldham* conducted his wife and their two children there, and having placed them with a careful old servant, under the protection of a lady and her husband, and other old friends of his, he returned to his regiment. He visited them again in *August*, the same year, and it was then, or soon afterwards, arranged that Mrs. *Shuldham* and her children, the elder of whom was also in bad health, should return to *England* in the *October* following, in company with a gentleman and his wife, friends of Captain *Shuldham*, who was not himself able to go with her in consequence of a general order, then recently issued, denying to military officers all leaves of absence, on private affairs, beyond the Presidency. Mrs. *Shuldham*, towards the close of the year 1838, after sending the younger child, as previously agreed on, with the nurse to her husband, proceeded to *Bombay*, and thence, in company with other friends of her husband, to the Cape of Good Hope, where they arrived in *May*, 1839, and went to reside in a boarding-house. A Major Downing, of the Indian Army, who

Before that event she wrote to her husband a letter, from which the following are extracts :—

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SHULDHAM'S
Divorce.

" February 11th, 1840.

" My Dear HENRY,

" I know not how to write a letter that will probably cause you so much pain as this will; and yet I think when you look back on the events of the last two years, you will scarcely feel surprised, and may even be somewhat prepared by all that has happened for what I am going to communicate. Recollect, *Henry*, when you insisted upon sending me from you, how strongly I opposed such separation; recollect when away, how often and anxiously I entreated your joining me, but to no purpose. You left me to the entire care of others, even when in a helpless state; and too kindly, too unceasingly was that care bestowed both on myself and children, as old *Martha*, I doubt not, has often mentioned. All this determined me to go to *England*, and see what time would produce. When you did visit *Erimpoorah*, your conduct confirmed my resolution. I need not recall what passed, but merely remind you of one expression (b) alone you then used, which of itself would have been sufficient to have determined me upon a return to *Europe*. I left *Erimpoorah* with the intention of going home direct. How circumstances changed that plan you have been made truly acquainted. * *

" On my arrival at the Cape, with Mr. and Mrs. *J.*, I found the former, instead of taking a house in the country, as he had proposed, made arrangements for our wintering at a public boarding-house in *Cape Town*. This was an extremely disagreeable situation for me, added to which, Mrs. *J.* became annoyed at the attentions I received both from residents and Indians, while she was neglected. This threw me entirely on the consideration of Major *Downing* and Colonel *A.* for all friendly attention, until Mr. and Mrs. *Scott*, seeing how I was situated, kindly took me to their house, as you have heard. Their departure was fixed for the end of *October*, when I should have been left without a home again. I therefore determined at once to accompany Captain *Downing* to *Bombay*, and proceed overland. He at one time proposed going to *New South Wales*, in which case I should most probably have gone with him. * * *

" Under these circumstances Captain *Downing* presented himself

(b) There was nothing in the evidence to explain what this meant.

.1845.
 {
 SHULDHAM'S
 Divorce.

before the medical board for a sick certificate to the *Neilherries*, which was granted at once, and we have accompanied him. I pass as his sister. Now, *Henry*, under these circumstances, and with my changed feelings, it is utterly impossible that I can return to you, or see you at present; for I should consider it more sinful to do the former than remain where I am for the remainder of my life.

“My plans are to stay until next cold season, and then take *Henry* to *England*; when there, if you make me the allowance you proposed, I shall be enabled to take care of and look after the education of my children; * * but let me entreat you not to act hastily or rashly. Recollect this is not a common or heartless affair. Recollect what unusual temptation you have exposed me to. * * I would strongly recommend your allowing us both to remain quietly where we are for the present. *Henry* is as fondly taken care of by Captain *D.* as he could be by yourself. I do not wish to exculpate any; but if you will give the case impartial consideration, I think you will see there is blame to be attached to yourself as well as others. * * * I have received your three letters with the *houdees* and third bill you kindly inclosed since I have been here. * * *

“F. A. H. S.”

This letter was produced on the part of Captain *Shuldham* in the suit in the Consistory Court, under the impression that his wife's admissions would be received as sufficient evidence of the adultery with Major *Downing*; but better evidence being required there, a commission

ample testimony to the husband's kindness, and to the happy and affectionate terms on which he lived with his wife in *England* and in *Nusseerabad*.

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SHULDHAM'S
Divorce.

The Lord Chancellor said it was quite unnecessary to examine more witnesses to rebut imputations of that nature, which were to be regarded, not as having any foundation in fact, but as mere excuses, which a woman, compelled to admit her infidelity, might be expected to invent for the purpose of palliating her guilt (c).

The other Peers present concurring with his Lordship, the bill was then read a second time (d).

On a petition presented by Captain *Shuldham's* attorney, a few days before, stating that he was still in *India* with his regiment, &c., the Lords made an order dispensing with his attendance on the second reading as required by the standing order No. 142.

(c) Several letters written by Mrs. *Shuldham* to her husband from *March*, 1838, to *June*, 1839, and produced in evidence, acknowledged his constant kindness, and made no complaint of inattention to her.

(d) The Bill in a few days after passed both Houses, and received the Royal assent.

1845.

June 23, 9.
August 8.*Plea of
foreign
judgment.
Sufficiency of
averments.*SAMSON RICARDO and JOHN LEWIS RICARDO *Appellants.*LORENZO GARCIAS - - *Respondent.*

Judgment was given by competent Tribunals in *France* against *Garcias*, in an action brought by him against persons with whom he had been connected in a loan transaction, for the purpose of obtaining from them an account, and payment of his share of the profits in the loan. He afterwards filed a bill in the Court of Chancery against some of the same persons, and for the same purposes, charging that the proceedings and judgment of the *French* Tribunals were contrary to justice and were not final and conclusive, and also, that subsequently to the date of the said judgment further profits accrued to the defendants from the said loan, and he claimed a right to a share of them :—

Held that a plea of the foreign proceedings and judgment—set forth in substance and effect—filed by the defendants to the bill, supported by averments that the matters in issue in the foreign Tribunals were the same as the matters put in issue by the bill, covered the whole of the matters comprised in the bill, and was a sufficient answer thereto.

In pleading a foreign judgment it is not necessary to set forth the proceedings and judgment at length.

—◆—
This was an appeal from an order of the Vice Chancellor of *England*, overruling a plea of a foreign judgment,

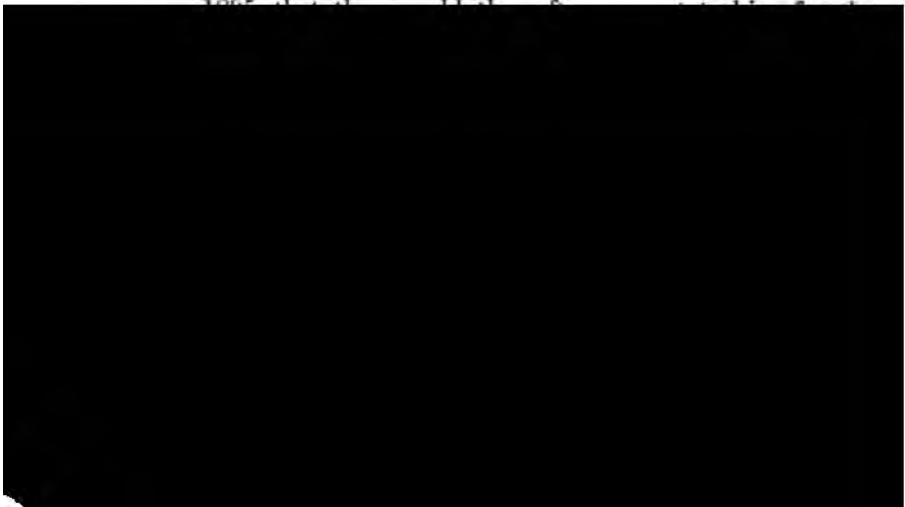
required an immediate advance of 500,000*l.*; and as an inducement thereto, he stated that the person or persons who should advance that sum should be recommended to his government for the contract of the said loan, and should in the mean time, as a provisional security for the said advance, receive bonds of the *Spanish* Treasury of equal amount in value; that M. *Ardoin* acted in the said correspondence as the agent of the appellants, then and still carrying on business as merchants in partnership in *London*, and it was arranged that the appellants should advance the 500,000*l.*, and that M. *Ardoin*, though ostensibly acting for himself, should in fact, as their agent, obtain for their benefit the contract for the said loan; that accordingly, M. *Ardoin* agreed with Count *Toreno* to advance the said sum, and the same was paid to the *Spanish* Government by bills drawn by its treasurer, and accepted by the appellants, who received from the *Spanish* Treasury bonds equal in value; that in *November*, 1834, the appellant, *Samson Ricardo* (who was then in *Paris*, and well known to the respondent as having been for many years employed by him as his broker in *London*), informed the respondent of the circumstances of the said advances, and of his expectation that M. *Ardoin* would, as the appellants' agent, succeed in obtaining the contract for the larger loan; and he proposed to the respondent to join therein, by contributing to the said advance, assuring him that the persons so contributing would be entitled to all the benefits arising from the contract for the larger loan in proportion to their contributions; that the respondent, after giving some days' consideration to those representations, wrote a letter from *Paris* to the appellants in *London*, requesting them to include him in the advantages of the loan, for the amount of 25,000*l.*, to form part of the advance of 500,000*l.*, with the understanding that he should have in that proportion the enjoyment of all the advantages attached to the contract

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RICARDO
v.
GARCIAS.

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of the loan ; and to provide for the payment of the 25,000*l.*, he placed at their disposal certain *Portuguese* bonds, which the appellants soon afterwards sold, and out of the proceeds thereof, and from other monies belonging to the respondent in their hands, they retained 25,000*l.* as the respondent's proportion of the advance of the 500,000*l.*

The bill then stated that, by a decree of the *Spanish* Government, dated 4th *December*, 1834, M. *Ardoin* was declared the contractor for the loan of 400,000,000 reals vellon ; and a contract in writing, containing the terms thereof, was shortly afterwards signed by Count *Toreno* on behalf of the *Spanish* Government, and by M. *Ardoin*, as agent of the appellants (the articles of the contract were here set forth in English) ; that, in pursuance of the contract, Count *Toreno* delivered to the appellants, or their said agent, bonds of his government for 701,645,386 reals vellon, at the price of sixty *per cent.*, which the appellants sold at a much higher price, and thereby realized large profits, besides receiving a commission of three *per cent.* on the nominal value of the said loan, by virtue of the contract, and other large sums for other commissions, interest, and exchanges ; that whilst the appellants were realizing such profits from the said contract, they assured the respondent by letter, in *April*, 1845, that they had been instructed by the *Spanish* Government to



ceiving that information, and being well aware that he was entitled to much larger shares of the said profits, wrote to the appellants, in *February*, 1837, claiming to be so entitled, and asking for explanation and accounts, but none were rendered to him.


The bill, after setting forth various pretences and charges, in the usual way, proceeded thus :—“ The said defendants further pretend that your orator, some time since, instituted legal proceedings against the defendants in the Courts of Law in *France*, in respect of the matters in his present bill of complaint set forth, and that the said Courts adjudged and decreed that your orator was not entitled to any relief against the defendants in respect of such matters, and the defendants insist that such proceedings and decrees are a bar to your orator proceeding against the said defendants in this Court : Whereas your orator charges, that true it is that your orator did institute legal proceedings against the said defendants in the Courts of Law in *France*, and the said Courts pronounced adverse decrees against your orator, but your orator charges that such proceedings and decrees are not a bar to your orator’s proceedings against the defendants in this Court ; for your orator charges that the matters in issue, and in respect of which your orator sought to be relieved, and the discovery and relief sought by him in the said proceedings in *France* were and are different from the matters in issue, and the discovery and relief sought in and by your orator’s present bill against the said defendants : And your orator further charges, that the said decrees of the Courts in *France* are, on the face of them, repugnant to and inconsistent with each other, and, moreover, contrary to natural justice and equity, as will appear by reference to the said proceedings, should the said defendants insist on them as a bar to your orator’s present bill of complaint : And your orator further charges, that the said Courts in *France*, which pronounced the

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aforesaid decrees against your orator, were not and are not Courts of final and ultimate jurisdiction, and that the said decrees are not final and conclusive: And your orator further charges, that, subsequently to the said second and alleged final division of the profits of the said contract and loan, and whilst the said proceedings in the *French Courts* were going on, and since the termination of such proceedings up to within a short time before the filing of this bill, the said defendants have, from time to time, received or retained divers large sums of money for and in respect of the profits arising from the said contract and loan, for which they have never accounted, nor never pretended to account, to your orator, or the said M. *Ardoin*, or any other person, as the alleged agent of your orator."

The bill prayed that it might be declared that according to the true construction of the agreement between the respondent and the appellants, the respondent was entitled to one-twentieth part of all monies received or retained by the appellants or their agent or agents for commission, interest, exchange, or otherwise, in respect or account of the profits arising from the said contract and loan; and that the respondent was not bound by the brief statements sent to him by the appellants through M. *Ardoin*; and that it might be referred to the Master to take an



and custom of that kingdom, a writ of summons directed to Messrs. *Ardoïn* and Co., and *J. and S. Ricardo* and Co., whereby it was stated that a loan having been contracted for at *Madrid* with the *Spanish* Government on the 6th *December*, 1834, by *M. Ardoïn*, as well for himself as for his co-partners, that operation gave rise to an association in participation which had for its managers *Ardoïn & Co.* and *J. and S. Ricardo* and Co., and in which the complainant became a participating party for a considerable sum, which he had paid; and that he having in vain demanded from *Ardoïn* and Co. and *J. and S. Ricardo* and Co. an account of the management which had been entrusted to them, there resulted from that fact a contestation, which, according to the terms of the 51st Article of the Code of Commerce, ought to be submitted to arbitrator Judges; wherefore the complainant, by the said writ, summoned *Ardoïn* and Co. and *J. and S. Ricardo* and Co., to appear on the 20th *June* then next before the Tribunal of Commerce of the *Seine*, in order that the matter in dispute might be referred to arbitrator judges: That the complainant caused the said summons to be served on *S. Ricardo*, as representing the firm of *J. and S. Ricardo* and Co., who did not appear thereto; but *Ardoïn* and Co., in pursuance thereof, appeared before the said Tribunal, and defended themselves against the complainant's claim; and thereupon such proceedings were had; that the said Tribunal, on the 21st *August*, 1837, made a decree which, so far as the same is material to be set forth, was, when translated, in these words:—

“So far as concerns the demand made against *Ardoïn* and Co., seeing that it is established and admitted as a fact, that upon the occasion of the present discussion their house not being engaged in any manner towards *Garcias*, the Court discharges *Ardoïn* and Co. from the action as regards the claim in participation made against *Ardoïn* personally, seeing that contracts of partnership are

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governed by civil rights, by laws peculiar to commerce, and by the agreements between parties : That in associations in participation the choice of partners is especially the first act by which the partnership manifests itself between the parties ; seeing that it results from all the facts of the case, that the loan, which has given rise to the discussion, was the object of participation between *Ardoin* and *Ricardo* and Co., but that if *Garcias* has taken an interest in this loan, it is directly with *Ricardo* and Co. of *London* : That, in effect, the application of *Garcias* was addressed directly to that house of business, and that, as a guarantee for his engagements, he pledged 20,000*l.*, which they held in deposit ; seeing that *Garcias* cannot infer from this fact an act of partnership against *Ardoin*, of whom he was not the partner, as it would violate the principle laid down in article 1861 of the Civil Code. For these reasons, the Tribunal declares *Garcias* remediless in his demand against *Ardoin*, and condemns him to pay the costs."

" So far as regards the demand made against *Ricardo* and Co., considering that nobody appeared in their behalf, the Tribunal grants to *Garcias* the benefit of the default pronounced against them ; and seeing that *Ricardo* and Co. are foreigners, that they have treated with a Frenchman, and that a foreigner is amenable to the French Tribunals in respect of engagements with French subjects, even




January, 1838, the said Tribunal made a decree whereby they dismissed *Ricardo* and Co. from the reference demanded by them, and in default of their answering to the merits of the demand, gave *Garcias* the benefit of their default; considering that *Garcias* was grounded in the judgment, the Tribunal dismissed *Ricardo* and Co. from their opposition thereto, and condemned them in costs; whereupon *S. Ricardo*, for himself and firm, appealed to the Cour Royale, which, by a decree of the 9th of *January*, 1839, affirmed the said decrees of the 21st *August*, 1837, and the 17th *January*, 1838: That the respondent also appealed to the Cour Royale against so much of the decree of the 21st *August*, 1837, as discharged *Ardoin* and Co. from this action, and declared him to be remediless against *Ardoin* personally; and the said Court by decree, dated the 30th *August*, 1838, set aside that appeal, and condemned the respondent in the costs thereof: That, in pursuance of the three decrees of the 21st *August*, 1837, 17th *January*, 1838, and 9th *January*, 1839, *S. Ricardo*, for himself and firm, appointed M. *d'Eichtal*, a banker at *Paris*, to be their arbitrator judge, who, together with M. *Pierrugues*, the arbitrator judge named by the respondent, appointed a meeting on the 18th *May*, 1839, at M. *d'Eichtal's* office, to constitute a Tribunal of arbitration: That on the 15th *March*, 1839, the respondent sued out, according to the law of *France*, a summons, whereby Messieurs *J.* and *S. Ricardo* and Co. being served therewith, were called on to appear, on the said 18th *May*, at M. *d'Eichtal's* office; seeing that by the judgments and decrees given between the parties, the respondent had been acknowledged the partner of *J.* and *S. Ricardo* and Co., of *London*, for the operation of the loan, with all its advantages, which had been contracted at *Madrid* by *Ardoin*, the 6th *December*, 1834, and that *J.* and *S. Ricardo* should render an account to the respondent of the said operation, as well as of the

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profits resulting from it, within a time named, or, in default, that they should be condemned to pay him two millions of francs.

The plea further stated that the arbitrator judges met at the time and place mentioned, and became duly constituted a Tribunal of arbitration; and the respondent, and the appellant *S. Ricardo*, with his solicitor and counsel, representing the firm of *J. and S. Ricardo and Co.*, appeared before them; and the respondent claimed to be entitled to one-twentieth part of the profits of the said loan; and written statements of his claim, and of the grounds thereof, and of the grounds of defence, of *S. Ricardo* for *J. and S. Ricardo and Co.*, were produced before the arbitrator judges, and formed part of the proceedings in the cause: That, by the respondent's statements and conclusions, it was contended that he had become the partner of *J. and S. Ricardo & Co.* in the loan for which they were in treaty with the *Spanish* Government in *November, 1834*; and that having provided funds to the amount of 25,000*l.*, he became entitled to his share in the partnership, and had been acknowledged by *J. and S. Ricardo and Co.* as their co-partner, to which end several sums had been remitted to them in that character, &c.; and that although the operation of the loan was entirely settled, the respondent had in vain




among other evidence, the several letters in the bill mentioned, or copies thereof, were read and relied on in support of the respondent's claims, and counsel were heard in behalf of each party, and the matter was fully discussed and heard on the merits; and the arbitrator judges finally made a decree, on the 30th *August*, 1839, whereby they declared the respondent remediless in his demand, and condemned him to pay the costs of the proceedings: That the respondent appealed to the *Cour Royale* against that decree, and by his written statements and conclusions filed before that Court, he repeated and insisted on his claim to one-twentieth part of the profits of the said loan, and impeached on various grounds the said decree of the arbitrator judges, and relied, among other things, on the letter of the 18th *November*, 1834, in the bill set forth; and he annexed to his said statements and conclusions an account shewing the nature and amount of the alleged profits, according to his estimation, whereby it appeared, as the fact was, that the alleged profits, to one-twentieth part whereof he so claimed to be entitled, were of the same nature, classes, and descriptions as, and identical in character with, the alleged profits, to one-twentieth part whereof he by his bill claimed to be entitled, and in respect whereof he thereby sought discovery and relief: That on the 31st *December*, 1840, the said *Cour Royale* gave judgment on the appeal, and by a decree of that date annulled the said appeal, and ordered the decree appealed against to have full effect, and condemned the respondent in the penalty and in the costs of the appeal, as by the said several proceedings would appear.

The plea then proceeded thus:—"That the said decrees of the 30th *August*, 1839, and 31st *December*, 1840, proceeded on the merits of the case, and not on any technical or formal ground, and that the same respectively are still in full force and effect, &c.: That the said proceedings so had in the said Tribunals and Courts in *France*, were, at

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the times when they were so had, within the jurisdiction of the same Tribunals and Courts respectively, and were carried on in conformity with, and according to, the due course of law at those times established, and in force in *France*: That the said decree of the 30th *August*, 1839, as affirmed by the said decree of the 31st *December*, 1840, is, according to the law and usage of the kingdom of *France*, final and conclusive, and that the same are effectual to bar the complainant from prosecuting any other action or proceeding in *France* for the same matters. And these defendants further severally say, and do aver, that the several matters and things in respect whereof relief was sought by the said complainant against the said *J. and S. Ricardo and Co.*, in the aforesaid suit and proceedings in the said Tribunals and Courts of *France*, were and are the same matters and things in respect whereof the said complainant, by his said bill, seeks discovery and relief against these defendants; and that the several claims and demands sought to be enforced by the said complainant in the said proceedings, in the said Tribunals and Courts in *France*, were and are the same claims and demands which the said complainant, by his said bill in this suit, seeks to enforce against these defendants; and that the matters in issue, and in respect of which the said complainant sought to be relieved, and the discovery and relief sought by the complainant in the said proceedings



that the said decrees and orders are, on the face of them and in fact, consistent with, and not repugnant to or inconsistent with, each other; and are, on the face of them and in fact, conformable and according to, and not contrary to or against, natural justice and equity, and that it will so appear by reference to the proceedings hereinbefore mentioned; all which matters and things these defendants do aver to be true, and they do plead the same in bar to the said bill, and the relief and discovery thereby sought, except as hereinbefore excepted."

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To the appellants' answer in support of the plea was annexed a schedule of documents, being the titles of the said decrees of the Tribunal of Commerce, Cour Royale, and Arbitrator Judges.

The plea was heard before the Vice Chancellor of *England*, on the 7th *March*, 1845, when his Honour, by an order of that date, declared the plea to be insufficient, and overruled it, with costs (*a*).

The appeal was against that order.

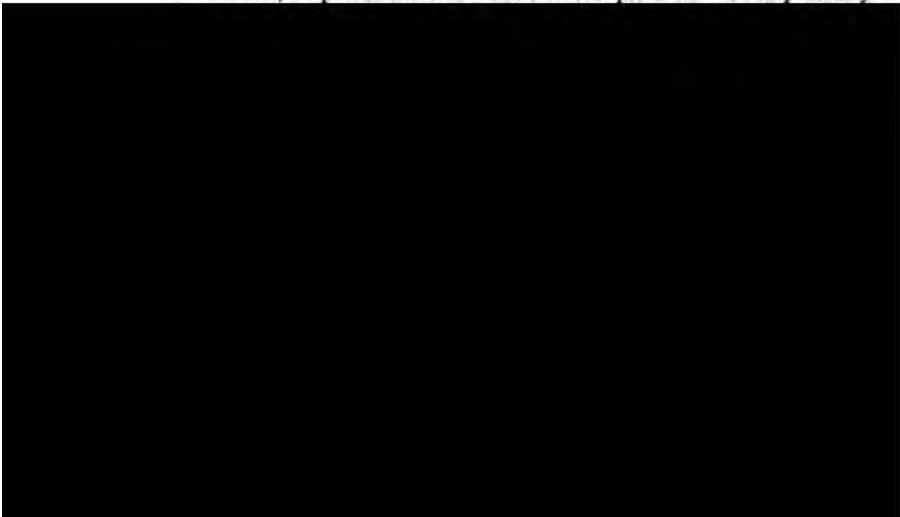
Mr. *Fitzroy Kelly* and Mr. *Stuart* (with whom was Mr. *Heathfield*) for the appellants. The respondent in

(*a*) The Vice Chancellor's observations in pronouncing his decision were added to the printed cases of both parties, and were to this effect:—I am not of opinion that this is a good plea, because it does not appear to me that the *French* Court decided the fact, that there was no partnership. It is quite consistent, as I understand what is stated in the plea with respect to the *French* proceedings, that the Court held that he had no claim, because he had been satisfied. The matter, as it is stated upon the plea, is quite consistent with the fact, that the *French* Judicature might have determined as it did, because it held the plaintiff had been satisfied. There is nothing whatever upon the face of the plea to shew that that is not the ground; and the plea is to shew that the judgment was conclusive of the case. Now, the judgment would have been conclusive of the case, if it

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this case insists by his bill that the loan transaction was a co-partnership business between him and the appellants, that the same has terminated, and that he is entitled

was shown by the plea that the ground upon which the Court proceeded was, that the plaintiff never had a claim ; but the fact, as I understand it, as it appears upon the face of what the plea discloses, with respect to the proceeding, is, that the plaintiff represented certain documents. I see they are exactly the same letters mentioned as being among the conclusions which are set forth in the bill, and those letters would certainly shew that there had been dealings in which *Ricardo* recognised *Garcias* as having an interest, and accounted for that interest ; and if the *French* Judicature were satisfied that there was no reason for taking any other account, and that the plaintiff had been satisfied all he was entitled to receive, of course they would hold that he was remediless ; of course, the very same conclusion would be come to in the very same terms. Now, I find on the face of this bill the fact alleged, that while the proceedings were going on, and subsequent to the proceedings, further sums were received, in respect of which the plaintiff has an interest. He charges that subsequently to the second and alleged final division, and whilst the proceedings in the French Courts were going on, and since the termination of such proceedings, up to within a short time of the filing of the bill, the defendants have from time to time received or retained divers large sums of money for, or in respect of, the profits arising from the said loan, for which they have never accounted, or pretended to account to the plaintiff. It is perfectly



to one-twentieth part or share of the profits. The appellants have always admitted that these were the terms of the agreement between them, and they have accounted for and paid the respondent's said share of the profits to his agents, *Ardoin and Co.* The respondent denies that they were his agents in the transaction, and demands a general account of the dividends and profits, and further payments. To that demand the appellants put in a plea to the effect, that the same was disposed of by the Courts of Law in *France*, and that the matters put in issue by this bill are the identical matters that were put in issue and decided in the *French* Courts : there is no question that they are Courts of competent jurisdiction.

The whole matters put in issue by the bill are met by the plea, which states the proceedings in the *French* Tribunals, and which is sustained by averments (*b*), 1st, that the decrees and orders of those Tribunals proceeded on the merits, and are still in full force and effect ; 2dly, that the said proceedings so had in the said Tribunals, were within their proper jurisdiction, and were carried on according to the laws of *France* ; 3dly, that the said

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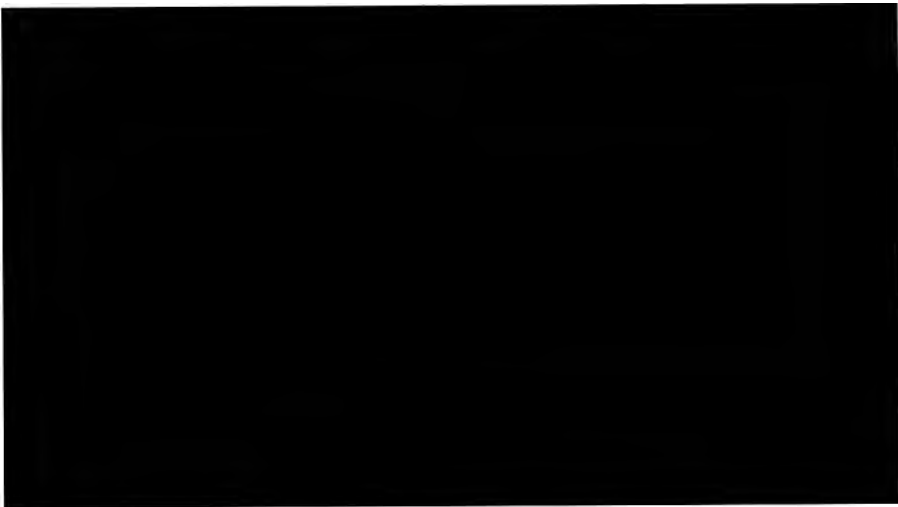
been so very easy to have said so. The question is—Was the plea correct ? My opinion is, that to make the plea effectual as against the whole bill, it must appear that the thing sustained as a matter of fact in the judgment of the Court of Law in *France* was, that Messrs. *Ricardo* never became liable to the plaintiff ; and there is no such fact, as it appears to me, to be extracted from what is contained in this plea, with respect to the contents of the foreign proceedings. And when my attention was called to it, I thought, as I still do think, that whatever the proceedings really were, this plea does not shew that Messrs. *Ricardo* are not, taking the allegations in the bill to be true, now accountable for those monies which were received subsequently to the time when the last sentence was pronounced in *France* ; and therefore my opinion is that the plea must be overruled.

(*b*) *Vide supra*, p 377-8.

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decrees and orders are final and conclusive, and an effectual bar against the respondent's prosecuting any other action in *France* for the same matters: 4thly, that the several matters in respect whereof relief was sought by the respondent against the appellants in the suit and proceedings in the *French* Courts, are the same matters in respect whereof he seeks relief and discovery against them by this bill; 5thly, that the claims sought to be enforced in the *French* Courts are the same claims which the respondent seeks to enforce by his bill; and 6thly, that the matters put in issue in the proceedings in *France* are the same, and not in any manner different from the matters put in issue by the respondent's bill in this suit. There is then a further averment, supported by answer, to the effect, that the said decrees and orders are consistent with, and not contrary to, natural justice and equity. The matters so stated and averred in the plea constitute a good defence to the claim made by the bill.

The Courts of Law in *France* have declared that the respondent is remediless in respect of the claim there made by him against the appellants. This House is not a court of appeal from decrees of the *French* Courts: their decision against the respondent was final and conclusive, so that by the laws and usage of *France* the respondent could not institute a new suit, in respect of the same claim,



the face of them, repugnant to natural justice, or founded on ignorance of the parties' rights, or upon some technical ground;—

(Lord *Brougham*.—Such as *Buchanan v. Rucker* (c), and *M'Carthy v. De Caix* (d).

The Lord Chancellor.—On what ground did the Vice Chancellor overrule this plea?)

His Honour admitted, that if it appeared that the *French Courts* really decided the question raised by the bill, the plea would be a good defence, but he considered the main question raised by the bill to have been, whether there was a partnership between these parties in the loan transaction, and that question did not appear upon the statements in the plea, as his Honour conceived (e) to have been decided in the *French Tribunals*. But it does appear from the proceedings and decrees in the *French Courts*, as stated in the plea, that the respondent's claim in dispute there was, that he was entitled to an account and payment of one-twentieth part of all the dividends and profits in the loan; and by examining his claim, as set forth in his own summonses stated in the plea, it will be seen that that claim does not at all differ from the claim made by his bill. He even anticipates in the bill that his claim would be met by the previous adjudication on his claim in the *French Courts*, yet he does not venture to deny that that adjudication disposed of his whole claim. In fact, all the respondent's claims against the appellants, in respect to the loan under the partnership agreement, were the subject of final adjudication by the proper Tribunals in *France*, and were brought before those Tribunals by the respondent himself. The only difference between the claims there made by him and those now made in this bill is, that the bill claims a share of profits in the loan accruing subsequently to the adjudica-

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(c) 9 East, 192.

(e) *Vide supra*, p. 380, *et seq.*

(d) 2 Russ. & Myl. 614.


(note).

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tion in the *French* Courts; but that adjudication concluded every claim in respect of the loan transaction, for it declared, in effect, that he was not entitled to any further accounts or profits in that transaction; in a word, that he was remediless;—

(Lord *Campbell*.—At common law, foreign judgments between the same parties, and on the same matters, are treated only as evidence in actions brought on them here; but the Vice Chancellor says, in *Martin v. Nicolls* (*f*), that they are conclusive).

And so they are held in that and numerous other cases. The whole question here turns on the identity of the claims made by the bill, with the claims that were made and adjudicated on by the foreign Tribunals. The questions at issue between those same parties in those Tribunals were, whether the accounts rendered, and the payments made by the appellants, were sufficient, and had effected their complete discharge from everything relative to the interests of the respondents in the loan. And on these questions the *French* Courts decided that, according to the law and usage as to loans, the accounts before rendered were sufficient, and the respondent had no right to any further account or to any further participation in the profits of the loan. As to the claim of profits accruing on that transaction subsequent to the termination of the



effect of the Vice Chancellor's decision is to open an account as to the whole of the profits. But it is submitted that his Honour's decision is a total miscarriage, and that it ought to be reversed.

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Mr. *Bethell* and Mr. *Lewis* for the respondent. The grounds of the Vice Chancellor's decision were, that the plea could not be an answer to the demands made in the bill, unless there was no account of profits liable to be rendered subsequent to the adjudication in the *French* Tribunals. His Honour, after observing that the bill "charges, that, subsequently to the second and alleged final division, and while the proceedings in the *French* Courts were going on, and since their termination, the defendants, from time to time, received divers large sums of money in respect of profits arising from the said loan, for which they have never accounted to the plaintiff," says, "if there ever had been a partnership, &c., and there were profits received subsequent to the alleged final division of them, the plaintiff would be entitled to an account, unless the Court abroad decided upon the general ground, that there was no case whereby the defendants became accountable;" and his Honour "did not find that fact averred upon the plea" (f).

It has been urged for the appellants that the *French* Courts adjudicated on the whole matter of relief sought by the bill: it is incumbent on them to shew that the plea is co-extensive with the relief sought by the bill; and if it appears that there is any part of that relief not barred by the plea, judgment must be for the plaintiff. The proper requisites to a plea of a former judgment are set forth in *Vinnius*, under the head, *de re judicata* (g): "*Hæc autem exceptio (rei judicatæ) non aliter genti obstat quam si eadem quæstio inter easdem personas revocetur. Itaque*

(f) *Supra*, p. 380.

(g) Lib. 4, Tit. 13, s. 5.

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ita demum nocet, SI OMNIA SINT EADEM; IDEM CORPUS, EADEM QUANTITAS, IDEM JUS, EADEM CAUSA PETENDI, EADEMQUE CONDITIO PERSONARUM." It must be shown by the plea itself that it is not defective in any of those requisites. Lord *Redesdale* says (*h*), "A decree determining the rights of the parties, and signed and enrolled, may be pleaded to a new bill for the same matter." A decree, not enrolled, cannot be pleaded at all. "The decree must be in its nature final, or afterwards capable of being made so, by order, or it not will be a bar." "Upon a plea of this nature, so much of the former bill and answers must be set forth as is necessary to shew that the same point was then in issue. A decree cannot be pleaded in bar of a new bill unless it is conclusive of the rights of the plaintiffs in that bill, or of those under whom they claim." And Mr. *Beames*, in his book, says (*i*), "As a plea of this kind proceeds upon the ground that the same matter was in issue in the former suit, and as every plea that is set up as a bar must be *ad idem*, the plea should set forth so much of the former bill and answer as will suffice to shew that the same point was then in issue; and where, therefore, the defendant pleaded only that a bill was brought for an account and a decree made, Lord *Hardwicke* considered the plea defective." In *Child v. Gibson* (*k*), the case there referred to, Lord *Hardwicke* said, "Every plea that is set up as a bar must be *ad idem*. Therefore if a plea is not

is pleaded is *ad idem*. There is no instance of a plea of a foreign decree being allowed in our Courts; and the materials for argument on the question are wanting. There is no enrolment of this decree, and a decree that is not enrolled cannot be pleaded in bar of a new bill (1). The parties to the two suits are not the same; there is no identity between the Messrs. *Ricardo*, the defendants to this bill, and the parties summoned as defendants in the proceedings in *France*: there is no averment that they are the same parties. There are several other objections to the form of the plea, but the objections to its sufficiency are more important.

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The plea does not shew what point was determined by the *French* Tribunals. As far as can be collected from the statements of the proceedings and orders, it would appear that the decisions of the arbitrator Judges and Cour Royale were determinations on the title of the party complaining, and not on his right to the account. The averments do not supply this deficiency. All those matters that are averred ought to be shewn by the record of the proceedings themselves. If the respondent's claims, as stated in the plea, be compared with his claims as set forth in his bill, it will be found that they differ in many respects, and the claims in the bill are much larger. There is no form of plea which the Courts judge more strictly than a plea of a judgment in bar:—

(*The Lord Chancellor*.—In general, in pleading a former judgment, you produce it with the proceedings to shew it is a judgment between the same parties and on the same matters. When the record is produced, the Court can compare and decide the identity of the parties and matters in issue; but, without the record of the proceedings, an issue is raised which the Court cannot decide. Lord *Campbell* signified his assent to these observations).

(1) Mitf. Plead. 239; Bea. Elem. 206, note 2.

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Exactly so ; and that is the ground on which the Vice Chancellor overruled this plea. It has been said by the appellants' counsel, that if the respondent disputed the truth of the plea, he might have taken issue on the facts. That is a thing that is never done. There are no special replications in our Courts. The plea itself should have the sentence or judgment, and the grounds of it, set forth on its face :—

(*The Lord Chancellor.*—It does not appear to me that the proceedings are sufficiently set forth. I have looked through the record carefully, and I confess I do not understand what were the matters in issue, or the points decided).

The practice of the Courts, in cases of this sort, when, from indulgence to a defendant, they do not overrule his plea, is to allow it to stand for an answer, with liberty to except. That was done in the case already referred to, *Roche v. Morgell* (*m*), which was affirmed in this House. In *Fitzgerald v. Fitzgerald* (*n*), a defendant to a bill in the Exchequer in *Ireland*, pleaded a former decree on the same matters in Chancery in *England*, and the plea was disallowed ; but this House, on appeal, reversed the order, and ordered the plea to stand for an answer. In *Behrens v. Sieveking* (*o*), a plea of proceedings and judgment in the Lord Mayor's Court in *London*, in bar to a bill in Chancery, was allowed by the Master of the Rolls (*p*).

alleged to have been taken in the Lord Mayor's Court, were conclusive, even in that Court;" and his Lordship "thought that the plaintiff could not have taken issue upon the plea." Every plea of a former judgment in bar ought to set forth so much, at least, of the judgment, as would shew that it was final and conclusive on the merits. The forms of such pleas in Chitty's and in Willis's books, shew the practice; and the doctrine is laid down in the leading cases on the subject from *Bernardi v. Motteux* (q), the earliest and best at common law, and recognised in *Lothian v. Henderson* (r), per Mr. Justice Lawrence; and from *Child v. Gibson* (s), in equity, followed by *Gregory v. Molesworth* (t), in which Lord Hardwicke says, "The question will be, first, whether the decree is a determination of the points between the parties." How can that question be answered unless the decree is set forth?

The conclusion from these principles of pleading is, that when it is not clearly apparent on the face of the judgment—not left in ambiguity, or to be collected by inference—on what points it adjudicated, and that it went to the merits, and was conclusive on them, it cannot be admitted as the ground of, or as an estoppel to, a new suit; *Sadler v. Robins* (u), *Fisher v. Ogle* (v), per Lord Ellenborough; *Smith v. Nicolls* (w), per C. J. Tindal; *Dalgleish v. Hodgson* (x), per C. J. Tindal; *Obicini v. Bligh* (y). From all these cases the rule at common law appears to be, that the record of the foreign or former judgment or sentence pleaded in bar, must shew distinctly and affirmatively, and not by implication merely, not only that it was pronounced by a court of competent jurisdiction, between parties within that

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(q) 2 Doug. 575.

(r) 3 Bos. & Pull. 526-7.

(s) 2 Atk. 603.

(t) 3 Atk. 626.

(u) 1 Campb. 253.

(v) *Id.* 418.

(w) 5 Bingh., N. C. 222.

(x) 7 Bingh. 504.

(y) 8 Bingh. 335.

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jurisdiction, but also that it was a final and conclusive decision on the merits of the matters in issue, which matters must also appear. How can all these ingredients in a judgment be shewn if they are not stated on the record? The same rule prevails in our Courts of Equity: it must appear, by the judgment itself, that it was *res judicata*, as in *Brandlyn v. Ord* (a), and the other cases and authorities before referred to. The late case of *Jones v. Nixon* (a), in the Exchequer, seems to be an exception to one part of the rule, a plea of a former decree being there allowed, though the decree was not on the merits, but for want of evidence. The report does not state any grounds for that decision.

But it is manifest, for other reasons, that the foreign judgment must appear on the record—how otherwise could it be questioned or impeached for fraud, irregularities, or inconsistencies with international law or natural justice and equity; faults within the judgment? *Mitf. Treat.* (b), *Lord Cranstoun v. Johnston* (c), *Foster v. Vassall* (d). To the bill in that case the defendant pleaded a suit, brought against him by the plaintiff, in the Court of Chancery in *Jamaica*, for the same accounts demanded by the bill, but neither the term nor year when the foreign suit was instituted being set out in the plea with certainty, for that defect in form Lord *Hardwicke* overruled it. In *Wolff v. Oxholm* (e), an ordinance of the *Danish* Government, under which a *Dane* paid to commissioners a

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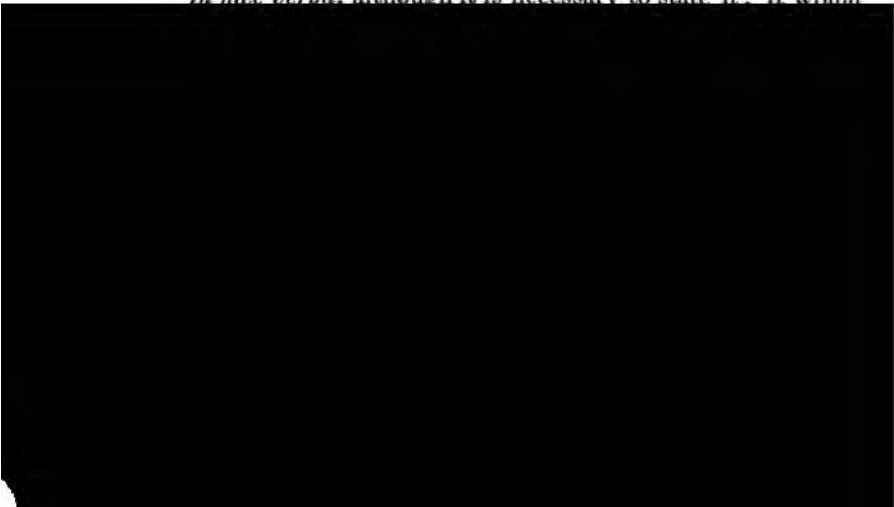
(g) 2 Clark & F. 470, 477; (i) 1 Doug. 1.
S. C. 8 Bligh. 301. (k) 5 Sim. 640.
(h) 9 East, 192.

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and as the facts alleged by the bill must be taken to be admitted by the plea, it follows that the proceedings in the *French* Courts, if they amount to a decision of the case, made by the bill, are contrary to justice and equity. It is therefore submitted, that the order of the Vice Chancellor, disallowing this plea, ought to be affirmed.

Mr. *Kelly*, in reply.—It may be shewn, on principle, precedent, and authority, that the objections to the plea are unfounded; they are, at best, but formal objections to the frame of the plea; and as the plea goes substantially to the merits, it would be contrary to justice to allow these objections. Here the plaintiff calls for an account of transactions with the defendants; they say he called for the same account in *Paris*, and there they proceeded with him to inquire into the merits of his claim, and it was proved that he really had none; yet he again asks the same account.

It is admitted, that if the defence made to this demand is well pleaded, it is a sufficient answer to it. It is true the defence must be well pleaded; the plea must shew that the decree, in the suit in *France*, was made between the same parties, who are parties to this suit, and upon the same matters. The question is, how they are to be shewn. It is not necessary to set forth the judgment on the record *in hæc verba*, although it is necessary to state it: it would



the practice in pleading foreign judgments. In *Behrens v. Sieveking*, Lord *Cottenham* held the plea was not sufficient, not because the proceedings in the former suit were not set forth *verbatim*, but because it did not shew that the proceedings were taken for the same purpose as the Chancery suit, and because it left the Court in ignorance, whether the proceedings which the plea alleged to have taken place in the Lord Mayor's Court were conclusive even in that Court. Can these observations be authority for requiring the whole proceedings and judgment to be set forth in the plea? This plea does set forth all that Lord *Cottenham* required; it states "that the alleged profits, to one-twentieth part or share whereof the complainant so claimed (in the suit in *France*) to be entitled, as aforesaid, were of the same nature, classes, and descriptions as, and identical in character with, the alleged profits, to one-twentieth part or share whereof the complainant by his said bill claims to be entitled, and in respect whereof he thereby seeks recovery and relief," &c.; and these defendants "aver, that the several matters and things, in respect whereof relief is sought by the said complainant against the said Messrs. *J. and S. Ricardo* and Co. in the aforesaid suit and proceedings in the said Tribunals and Courts in *France*, were and are the same matters and things in respect whereof the said complainant, by his said bill in this suit, seeks discovery and relief against these defendants," &c. (He read at large from the plea and averments, as set out *supra*, pp. 377-8).

The foreign proceedings are sufficiently set out to enable the Judge in equity to see what was the nature and purpose of them; but if they were all set forth *verbatim*, he would not be thereby enabled to say the adjudication was final and conclusive; that is a question of evidence for *French* lawyers, and not matter of judicial cognizance for the Court. In *Ireland* and *England* it was usual to set forth fully the former judgments, because the Judges before


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whom they came would know whether they were final and conclusive, and consistent with justice and equity ; but they could not give any opinion on a foreign judgment, and therefore to set it out in full would be worse than useless ;—

(Lord *Brougham*.—No one contends that the judgment and proceedings should be set out in full, but we should have such a description of them as would enable us to know what was decided).

And so much of them as is sufficient for that purpose is set out ; if there is any deficiency, it is supplied by the averments, which must be taken to be true, as the respondent has not taken issue upon them. In a note to *Pitt v. Knight*, in *Saunders's Reports* (from which the form of plea of judgment recovered, that has been cited from *Chitty's Pleading*, is taken), Serjeant *Williams* says (*l*), “ It is not necessary to set forth the *whole* proceedings, as is done here ; it is enough to state shortly, that the plaintiff in *Easter Term*, &c., impleaded the defendant in the Court of our Lord the King, in a plea of debt, and that *such proceedings were thereupon had* ; that afterwards, in *Trinity Term*, &c., the plaintiff, by the consideration of the said Court, recovered his said debt, &c. So, in pleading the judgments even of inferior Courts, it is now held not to be necessary to set out the cause of action, &c. ; but



of late years been overruled, there are still some technical rules for pleading a former judgment in bar : for instance, the term, year and court, &c., must be stated, and there is a verification referring to the record, *prout patet per recordum* ; but it is not necessary to plead so much of a foreign judgment, because it must be pleaded only as a fact, and there is no record ; and in bringing an action of debt on a foreign judgment, it is not necessary to shew the grounds of it, *Walker v. Witter* (m). And even *Irish* judgments are pleaded in *England* as facts, not being records, *Collins v. Lord Mathew* (n), *Harris v. Saunders* (o).

Nothing could be more inconvenient than to set out the whole proceedings and judgment at law in a plea to a bill in equity. It is possible—without surmising the fact to be so—that the judge in equity knows nothing of the form or import of the proceedings at law ; and, *à fortiori*, it cannot be presumed that he is conversant with a foreign judgment, no more than that a Judge in a foreign Court is conversant with English judgments. It would therefore be worse than useless to occupy the Judge's time, and embarrass his mind by setting forth, in full, matters of which he is not able to take judicial cognizance. The plea in bar to a bill in Chancery, which was allowed by Lord *Hardwicke* in *Williams v. Lee* (p), and which has been cited from Mr. *Beames's* book (q), states shortly that an action was brought in trover, in such a term, in such a Court, and a verdict was obtained, which was still in force, &c.

In the cases referred to for the respondent, much stress was laid on the words "it must appear," or "it must be shewn," used by Judges in speaking of judgments recovered ; but these expressions, when referring to a plea in

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(m) 1 Doug. 1.

(n) 5 East, 473.

(o) 4 Barn. & C. 411.

(p) 3 Atk. 223.

(q) Elem. of Pleas, 337.

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bar, do not import that the whole proceedings must appear or be shewn, but that there must be an intelligible statement of them; something more, perhaps, may be required when judgments are made matter of defence: but there is no precedent for setting out the whole proceedings in a plea in bar. In *Callander v. Dittrich* (r), a foreign judgment was pleaded in bar to an action, since the new forms of pleading, and the substance of it only was set out. If, this House were to hold that this plea ought to set out the whole proceedings in the foreign Tribunal, all the Courts in Westminster Hall must alter their practice. In the case last mentioned, it was found that the judgment pleaded was not on the same matter; and the like result might be found in this case, if issue had been taken on the plea. But however much or little of a foreign judgment is set forth in a plea in equity, the Judge there cannot take on himself to say it is final and conclusive, but he must take evidence on it, or send it to a jury, if the facts are disputed. All that is material in this judgment is set forth in the plea, with full and proper averments, covering all the allegations in the plea.

Mr. *Bethell* observed on the case of *Callander v. Dittrich*, that there the very thing was done which he asked to be done in this case. The plea was in fact overruled. In the report Mr. Justice *Egging* says (p. 748) — "The

plea as to the legal effect of this document, and the real effect of the document produced." The House will bear in mind that in Courts of Equity there is no special replication, so that the plea must prove itself.

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The Lord Chancellor.—This is an appeal from a decision of the Vice Chancellor of *England*. The case arose out of a loan transaction with the Government of *Spain*. Messrs. *Ricardo* and Co. entered into a contract with that Government, and Mr. *Garcias* was interested in the transaction. Accounts were rendered by Messrs. *Ricardo* to Mr. *Garcias* upon two occasions, through Mr. *Ardoin*, his banker in *Paris*; and the balance, which was stated to be due, was paid to Mr. *Ardoin*, on account of Mr. *Garcias*. Mr. *Garcias* was dissatisfied with these accounts, the last being represented by Messrs. *Ricardo* as the final settlement on account of this transaction. Proceedings were accordingly instituted in the Courts of France by Mr. *Garcias* against Messrs. *Ricardo*—one of the partners being at that time resident in *Paris*.

Aug. 8.

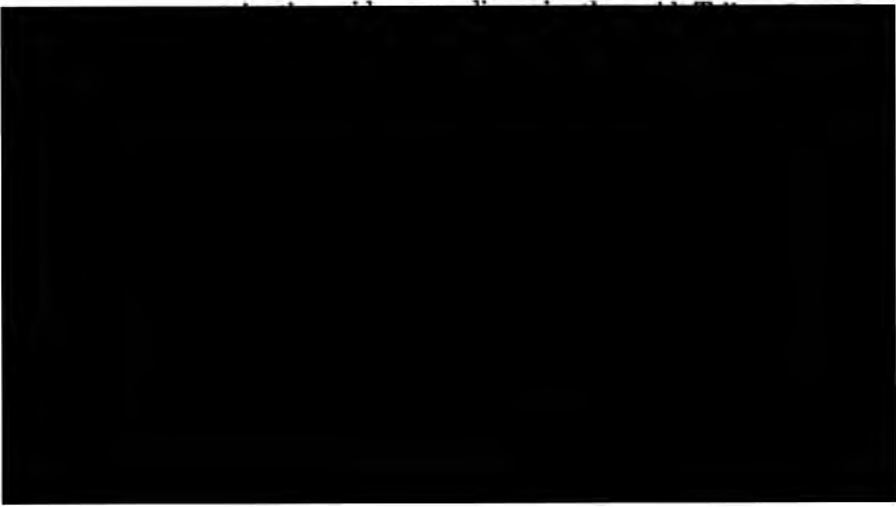
The subject was investigated and heard before the proper Tribunal; and it appearing to be a commercial and partnership question, they referred it, according to the law of *France*, to certain arbitrator judges. After hearing the case on both sides, and attending to the different documents, they pronounced judgment in favour of Messrs. *Ricardo*, and the suit was dismissed. Mr. *Garcias* was dissatisfied with that decision, and appealed to the Cour Royale, at *Paris*. The case was heard a second time, on that appeal, and the decision of the Court below was affirmed, and Mr. *Garcias* was condemned in costs. The bill has since been filed by Mr. *Garcias* against Messrs. *Ricardo*. The defendants, Messrs. *Ricardo*, have pleaded in bar the judgments which they obtained in their favour in *France*; and the question is whether, having regard to

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the manner in which these judgments are pleaded, they are a sufficient bar to this claim.

In considering this question, we must assume the truth of every fact stated on the face of the plea. The plaintiff might have taken issue on those facts, if he had thought proper ; but, in the shape in which the question now comes before your Lordships, every fact stated in the plea must be taken to be true.

The defendants, after stating the proceedings in the Courts of *France*, proceed thus : they aver (s), "that the several matters and things in respect whereof relief was sought by the said complainant against the said Messrs. *J. and S. Ricardo and Co.*, in the aforesaid suit and proceedings in the said Tribunals and Courts in *France*, were and are the same matters and things in respect whereof the said complainant by his said bill seeks discovery and relief against these defendants." There is an averment therefore that the matters and things that were brought before the Tribunals in *France* by Mr. *Garcias*, were the same matters and things in respect of which discovery and relief are sought by him in the Court of Chancery here. That fact must be taken to be true ; "and that the several claims and demands sought to be enforced by the said complain-



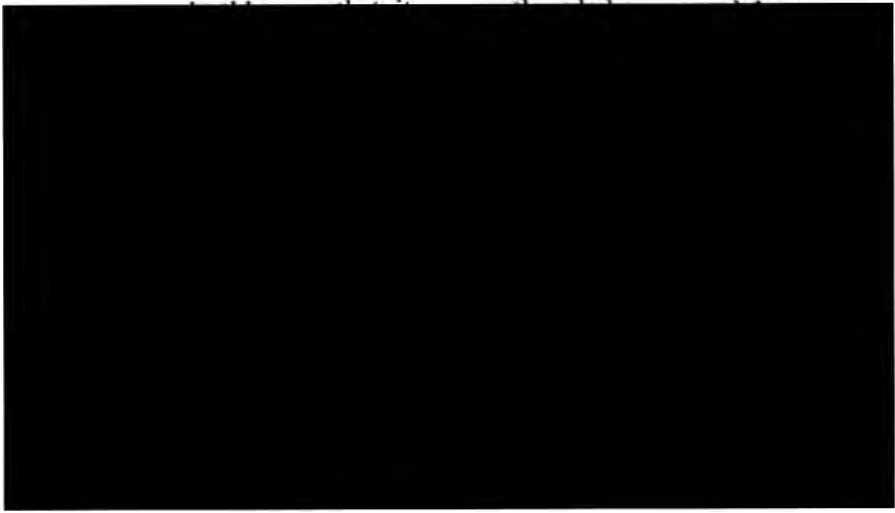
ters in issue, and the discovery and relief sought in and by the said complainant's bill in this suit against these defendants." So that it is averred, that the matters and things which were the subject of dispute before the Tribunals of *France* are the same matters and things as are in dispute between these parties before the Court of Chancery here; and that the matters in issue in the Courts of *France* were the same matters as are in issue in the Court of Chancery in this country, and not other or different. That being so, and the averment not having been traversed, it would seem that if the foreign judgments can be pleaded in bar of the claim—which is not denied—these foreign judgments are sufficiently pleaded in the present case.

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But then the Vice Chancellor of *England*, referring to the bill, adverts to one allegation in it, and, on the ground of that allegation, he was of opinion that the plea was not sufficient, and that it must be overruled. That allegation is to this effect: that after the decision by the Tribunal in *France*, further commissions and further receipts of interest were obtained in respect of these transactions by Messrs. *Ricardo*. Now the Vice Chancellor of *England*, in the course of his judgment, as I understand that judgment, expressed himself to this effect: It does not appear precisely upon what ground the judgment was pronounced; if it was pronounced upon the principle that the suit could not be maintained generally, then that would be an answer to these subsequent receipts; it would apply as well to the receipts obtained subsequent to the judgment as to those before; that is, if it was denied that there was originally any right of action, or any partnership, or anything which went to the whole suit, it would cover the subsequent payments. But it is possible that the Court might have decided on this ground, that up to the period of the institution of the suit Mr. *Garcias* had received satisfaction of all he was entitled to receive up

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to that time; and if the judgment proceeded upon that ground, it would be perfectly consistent with the judgment, that he should be entitled to recover in respect of any receipts subsequent to the date of the judgment. On that ground it was that the Vice Chancellor considered the plea to be insufficient. But with all deference to, and respect for the opinion of, that learned Judge, if we look very closely to the averments in the plea, they afford, I think, an answer to that objection. The averment is to this effect: the defendants allege that the matters in issue in this suit are the same, and not in any respect different from the matters in issue in the *French* Courts. As this averment must be taken to be true, it follows that the question in issue in the *French* Courts must have involved as well the future as the past accounts; and the question must have been general, and not merely applicable to the then state of the receipts and payments; it must have included the right to share in the future as well as in the past receipts, and to call for an account of such receipts. The Courts then having pronounced against the claim, they must have proceeded either on the ground that no such right had ever existed, or that it had in some way been put an end to. It is obvious that, in either view of the case, the judgment would be a bar to the present claim. It appears to me, therefore, considering the plea



argument, I entertained considerable doubt. I was clearly of opinion, that a foreign judgment might be pleaded as *res judicata*, because the foreign Tribunal has clearly jurisdiction over the matter, and both parties having been regularly brought before the foreign Tribunal, and that Tribunal having adjudged between them, I think that such a judgment would be a bar to a subsequent suit in this country for the same cause. But my doubt arose as to whether the proceedings in the foreign Court were in this case sufficiently set out. However, after full consideration, and particularly attending to the allegation, which my noble and learned friend has pointed out, that the matters and things now in issue are the same as those which were in issue and were determined in the foreign Court, I think that is sufficient, and that the decision appealed from is erroneous.

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(It was accordingly ordered and adjudged, that the order of the 7th of *March*, overruling the plea of the 6th of *February*, 1845, to the amended bill of the respondent (the plaintiff in the Court below) be reversed, so far as the said order overruled the said plea, and directed the appellants to pay to the respondent the costs of such plea; and it was further ordered, that the respondent do pay the appellants their costs occasioned by the said plea; and that the cause be remitted back to the Court of Chancery to do therein as shall be just, &c.)

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June 16, 17.	of Newcastle-upon-Tyne - - -	
July 7, 8.	THE ATTORNEY GENERAL, and the MAS-	} <i>Respondents.</i>
August 1.	TER, BRETHREN, and SISTERS, of the Hospital of Holy Jesus, in Newcastle.	

*Statute; con-
struction of
words.
Charity
Corporation.
Prohibition
against
alienation.
Pleading.*

The Act 39 Eliz., c. 5, enables "all and every person and persons" to found hospitals for the poor, and to incorporate them:—
A municipal corporation is included in the words "every person and persons," and may exercise the powers given by the act.
A voluntary conveyance of real estates to a charity is not defeated by a subsequent conveyance of them for valuable consideration.
Real estates conveyed to, and vested in, an hospital founded under the Act 39 Eliz., c. 5, cannot be alienated by the hospital, nor can it confirm an alienation of them by the founders.

A municipal corporation voluntarily founded an hospital under the act 39 Eliz., c. 5, and purchased real estates, and caused them to be conveyed to the hospital, but which were kept under the control and management of the founders, who afterwards sold and conveyed them for valuable consideration, granting to the purchasers covenants for title and indemnity against the claims of the hospital. The founders applied the money produced by the sale, together with other monies of their own, in the purchase of an estate at W., and they paid annually to the hospital more than the rents and profits of the sold estates. The hospital at first concurred in that arrange-

of W., the Attorney General's right to protect the charity still existed.

3d. *Seemle*, that though the hospital's bill should be dismissed, the Attorney General's information would be retained.

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PREVIOUSLY to the year 1682, the Corporation of the town of *Newcastle-upon-Tyne*—then, and down to the passing of the Act 5 & 6 W. 4, c. 76, styled “The Mayor and Burgesses of the town of *Newcastle-upon-Tyne*,” consisting entirely of freemen, and governed by a common council, composed of a Mayor, Aldermen, Sheriff, and Common Councilmen—erected an hospital in a place called “the Mannors,” in the said town for their poor freemen and their families. In *January*, 1682, the said common council ordered that 900*l.* be paid out of the town revenues for the purchase of certain lands, to be settled for the use of the hospital. And for founding and establishing the hospital, the mayor and burgesses, in pursuance of the Act 31 Eliz., c. 5 (*a*), (made perpetual by

(*a*) By the first section—after reciting that by the 35th Eliz., c. 7, s. 27, it was made lawful *for every person* during the twenty years then next following, by feoffment, *will* in writing, or other assurance, to give and *bequeath* in fee simple, as well to the use of the poor as for maintenance of any house of correction or abiding houses, all or any part of his lands, tenements, or hereditaments, but that the said law had not taken effect by reason that no person could incorporate any hospital, house of correction, or abiding places, but her Majesty, or by her licence—it was enacted “That *all and every person and persons* seised in fee simple, their *heirs, executors*, or assigns, shall have full power, &c., at any time during the space of twenty years next ensuing, by deed enrolled in the High Court of Chancery, to erect, found, and establish one or more hospitals, *Maisons de Dieu*, abiding places, or houses of correction, at his or their will and pleasure, as well for the finding, sustentation, and relief of the maimed, poor, needy, or impotent people, as to set the poor to work, to have continuance for ever, and from time to time to place therein such head and members, and such number of poor as to him, *his*

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21 James I, c. 1), executed a deed under their common seal, bearing date the 26th of *March*, 1683, and enrolled, and thereby appointed forty persons, then inmates of the hospital, to be a body corporate by the name of "The Master, Brethren, and Sisters of the Hospital of the Holy Jesus, founded in the Mannors, in the town and county of *Newcastle-upon-Tyne*, at the costs and charges of the mayor and burgesses of the town of *Newcastle-upon-Tyne*," with a common seal, and with full power to sue and be sued as a corporation; and to purchase, take, and hold to them and their successors for ever, as well goods and chattels as lands and tenements, being freehold. And

heirs and assigns, shall seem convenient; and that the same hospitals or houses so founded shall be incorporated and have perpetual successions for ever, in fact, deed, and name, and of such head, members, and numbers of poor, &c., as shall be appointed, &c., by the founder or founders, *his or their heirs, executors*, or assigns, by any such deed enrolled: And that such hospital, &c., and the persons therein placed, shall be incorporated, named and called by such name as the said founder or founders, *his heirs, executors*, or assigns shall so limit, assign, and appoint: And the same hospital, &c., so incorporated and named, shall be a body corporate and politic, and shall by that name of incorporation have full power, &c., to purchase, take, hold and enjoy, and have to them and *to their successors* for ever, as well goods and

it was by the deed provided that the said mayor, aldermen, and common council, for the time being, should be visitors of the hospital, and should make rules for the government thereof. By the rules, which were made soon afterwards, certain sums were to be paid annually out of the town revenues to "the master, brethren, and sisters," until lands could be purchased, which together with the lands before purchased would make up 180*l.* a-year for the discharge of the said annual payments.

For the purpose of endowing the hospital, and providing for its maintenance, the mayor and burgesses of *Newcastle-upon-Tyne* purchased divers lands and tenements, and caused the same to be conveyed to its use. Accordingly by an indenture of bargain and sale, dated the 27th of *March*, 1683, and duly enrolled, Sir *Ralph Carr*, in consideration of 710*l.* paid to him by the mayor and burgesses out of the town revenues, granted and conveyed, by their direction, certain premises therein described, situated in *Newcastle*, to "the master, brethren, and sisters of the said hospital, and their successors for ever." And by two

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assigns, according to such rules, &c., as shall be set forth, &c., by the said founder or founders, their *heirs* or assigns, &c."

Section 3. "Provided also, that this act, and any thing there contained shall not extend to enable any person or persons being within age, women covert without their husbands, or of *non sane memorie*, to make any such corporation, or to endow the same."

Section 4. "Provided always, that no such hospital, *maison*, &c., be erected, founded, &c., *unless upon the foundation or erection thereof the same be endowed* for ever with lands, tenements, or hereditaments of the clear yearly value of 10*l.*, &c."

Section 5. "Provided also, and be it enacted, that no such incorporation to be founded by force of this act *shall do or suffer to be done any act or thing whereby any of the lands, &c., of such incorporation shall be vested or transferred in or to any other whatsoever*, contrary to the true meaning of this act; and that such construction shall be made on this act *as shall be most beneficial and available for the maintenance* of the poor, and for repressing all devises contrary to the true meaning of this act."

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other indentures, dated respectively the 6th of *November* 1683 and the 24th of *September* 1685, two freehold estates called *Etherley* and *Whittle*, in consideration of 1610*l.* for the former, and 1300*l.* for the latter, paid to the vendors by the mayor and burgesses out of the said town revenues, were by their direction and appointment conveyed to the said master, brethren, &c., and their successors for ever. The coal mines under these two estates, with the liberty of working them, were excepted out of the conveyances, and reserved to the vendors ; but they afterwards became the property of the said mayor and burgesses. These estates, thus conveyed to the hospital, were afterwards managed, and from time to time demised (in name of the hospital), by the mayor and burgesses, who received the rents and profits, and carried them, as appeared by their books, to the general town fund, out of which all necessary payments were made for the support of the hospital.

In the year 1714, the mayor and burgesses of *Newcastle* contracted for the purchase of an estate situate on the banks of the *Tyne*, and called the estate of *Walker*, for 12,220*l.* ; and the same was in *January*, 1715, conveyed to Messrs. *White* and *Ramsay*, their heirs and assigns, as trustees for the said mayor and burgesses, who for the purpose of raising the said sum, entered into contracts

to sell several estates, including those of *Etherley* and *Whittle*.

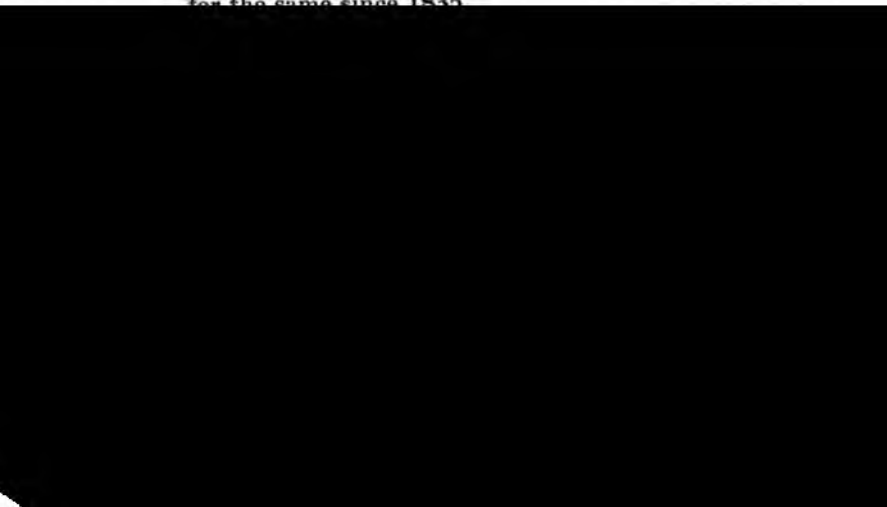
master, brethren," &c., to sell the estates, and for establishing for their use a rent-charge of 185*l.* a-year on part of the *Walker* estate, worth 275*l.* a-year. Application was made to Parliament accordingly in 1716, and repeated in 1717, in the names of both parties, for a bill to effect these objects, but no bill was passed. Subsequent applications were made to Parliament for the same purposes by the mayor and burgesses alone, but without success. The mayor and burgesses, nevertheless, conveyed the *Etherley* and *Whittle* estates, in *December*, 1720, to the respective purchasers, with various covenants for title and indemnity as against "the master, brethren," &c., of the hospital; and they received the purchase monies, making altogether 3815*l.*, and applied the same with other funds in part payment of the consideration for the *Walker* estate; for holding which they obtained a pardon and licence from the Crown in 1723; and in the year following an order of common council was made, charging that estate with a yearly payment of 185*l.* to the hospital, in lieu of the *Etherley* and *Whittle* estates, until an act of Parliament should be obtained for the purposes before mentioned. No such act was ever obtained. Certain yearly sums as hereinafter mentioned were paid to the hospital; and matters continued in that state down to the year 1835, when by the Act 5 & 6 W. 4, c. 76, a change was made in the name, constitution, and government of the corporation of *Newcastle-upon-Tyne*.

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In 1836 the respondents filed their information and bill against the appellants and their town clerk, whereby, after stating at great length the several matters before mentioned, and charging, among other things, that the said mayor and burgesses, from the year 1683 to 1769, paid the said master, brethren, &c., 162*l.* a-year; and from 1769 to 1807, 242*l.* a-year, and afterwards 322*l.* a-year, and 422*l.* until the year 1825, when the mayor and burgesses increased the hospitallers to the number

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of forty-two, and increased the annual payment to 548*l.*, all which payments were made out of the *Walker* estate, the rents whereof had increased to 3000*l.* a-year, and, therefore, the said payments to the hospitallers were less than they were entitled to. The information and bill prayed, among other things, that the appellants might be declared trustees in equity for the respondents, "the master, brethren," &c., of the hospital, of such a proportion, in yearly value of the said estate at *Walker*, as the said sum of 3815*l.*, produced by the sale of the estates at *Etherley* and *Whittle* and applied towards the purchase of the estate at *Walker* aforesaid, bears to the said sum of 12,220*l.*, the purchase-money for the estate at *Walker*; and that the appellants might be decreed to convey such proportion as aforesaid of the last mentioned estate to the said respondents and their successors for ever; and to pay to them a like proportion of the rents and profits of the said estate, received by the appellants, since 1835, or that such other right and interest of and in the estate at *Walker*, as the Court might think proper, be decreed to the said respondents; and that accounts might be taken of the said rents and profits; and that the appellants might be decreed to deliver up to the said respondents the messuage and premises, the property conveyed by Sir *R. Carr*, and account for and pay to them a proper occupation rent for the same since 1835.



government of the hospital were also executed ; and they submitted to the judgment of the Court, whether the said master, brethren, &c., were, by virtue of that indenture, duly constituted a corporation ; and the appellants also stated they believed, from the documents referred to, that the said mayor and burgesses did, for the purpose of endowing the said hospital, purchase certain lands, &c. (as in the information and bill mentioned), but they submitted to the judgment of the Court how far such purpose was effected under the circumstances ; and they believed the mayor and burgesses continued to manage the lands, &c., so purchased, as if they had been the property of the corporation ; and though the said lands were conveyed to the hospital, they did not believe the hospital was ever let into possession of them, or received the rents and profits ; and they admitted, as their belief, that the mayor and burgesses intended, that the premises purchased by them for Sir *H. Carr*, should be conveyed to the hospital, but which, in fact, was not then founded as a corporate body, and it was not now possible to identify that property ; and they admitted, according to their belief, that the estates of *Eltherley* and *Whittle* were purchased by the said mayor and burgesses, with the corporation monies, with the intention of applying the rents towards the support of the hospital as long as they chose, and that conveyances of said estates were taken in the names of the master, brethren, &c., of the hospital, but it did not appear that the deeds of conveyance were ever delivered to the hospital ; and they submitted to the judgment of the Court, whether, under the circumstances, the master, brethren, &c., did or did not, by virtue of these conveyances, ever become seised, or well entitled to the lands, &c., comprised in them ; and they said it did not appear from their books that the master, brethren, &c., ever had possession of any of the said lands, but, on the contrary, they remained in the possession of the corporation, who also received the rents,

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1845. &c., until they sold the *Etherley* and *Whittle* estates; and
 { the appellants submitted whether, under the circumstances,
 The the said mayor and burgesses became trustees in equity
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 of Newcastle estate at *Walker* as the sum of 3815*l.*, the proceeds of the
 v. sale of the estates, bore to the sum of 12,220*l.*, the whole
 The purchase-money of the estate at *Walker*.
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The cause was heard by the Master of the Rolls in *July*, 1842, when his Lordship decreed (*b*) that the respondents, the master, brethren, &c., of the hospital, were entitled to such proportion of the *Walker* estate, as the produce of the sales of the *Etherley* and *Whittle* estates (3815*l.*) contributed to the purchase of the *Walker* estate, the said sum of 3815*l.* being subject to reduction, to the extent of any monies which the appellants could show to have been applied in the purchase of leasehold interests, subsisting in the *Etherley* and *Whittle* estates, at the time they were sold, and it was referred to the master to inquire what monies, if any, were so applied; and it was declared that, upon a conveyance being made to the hospital of such proportion of the *Walker* estate as should be ascertained to belong to it, the appellants would be entitled to have the conveyances of the *Etherley* and *Whittle* estates confirmed by the hospital; and it was referred to the master

Mr. *Kindersley* and Mr. *Koe* (with whom was Mr. *Bates*), for the appellants :

1. The master, brethren, and sisters of the hospital were not legally constituted a corporate body, to have continuance for ever. The object of the act 39 *Eliz.* cap. 5, was not only to have property conveyed for the benefit of abiding houses, and other institutions for the poor, therein mentioned, but also to create corporations of them, and to make them perpetual ; and all endowments of them would fail unless they were at the same time incorporated. The act, therefore, enabled "all and every person and persons" to incorporate and endow such institutions, but it did not by these, or any other words, enable a corporation to create a corporation. The scope and terms of the act clearly show, that the power to found a corporation was given only to individuals, who might, however, appoint corporations to be visitors and governors of the new corporations. Wherever the act speaks of "the founder or founders," it uses the words "heirs," and "heirs and executors," words which would not be applicable to corporations ; but where it speaks of the ordering and visiting of the new corporations, it uses the word "successors," as well as heirs (c), the former being applicable to corporations which may be appointed visitors by the founders and their heirs.

There is no decided case putting a construction on this part of the act ; but Lord *Coke*, commenting on the act, says (d), "the words all and every person and persons extend to such bodies politick and corporate as may alien, as mayors and commonalties, bayliffs and burgesses," &c. This is an opinion of great authority, no doubt, but it is an opinion written in the closet, off hand, without any discussion ; a mere *dictum*, not confirmed by any decision in Court ; and an opposite construction is put upon the

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(c) *Ante*, note, 403-4.

(d) 2 Inst. 722.

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words "person or persons," in the Statute of Uses (*e*), by Lord *Bacon*. In the construction of a statute, assistance is received from the construction that has been put on the same words in other statutes, although they are not in *pari materiâ*. The Statute of Uses enacts, that "where any person or persons stand or be seised, &c., of and in any honours, castles, manors, lands, &c., to the use, confidence, or trust of any other person or persons, or of any body politick, by reason of any bargain, &c., all and every such person and persons, and bodies politick, that have, or hereafter shall have, any such use, &c., shall stand and be seised," &c. There is a distinction made between the person to stand seised and the person to whose use the other stands seised, and to the latter person or persons are added "body politick." And Lord *Bacon*, commenting on this statute, says, "a corporation cannot be seised to a use," and he gives the reasons (*f*). So that the words "person or persons" in that statute have been construed and held not to include corporations: and a like construction has been judicially put on the same words in the statute of Mortmain (*g*), *Walker v. Richardson* (*h*). Great as is the respect due to any opinion of Lord *Coke*, it is not binding on this House, having before it all the materials for decision that Lord *Coke* had, besides having the distinction in the words of the act, raised in argument before



(Lord *Cottenham*.—Strict rules of pleading are not applied to cases upon charities. Suppose the plaintiffs are not a body corporate, and have no title to sue as such, is there any authority for saying that, if their bill is dismissed, the information of the Attorney General must also be dismissed ?)

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It appears too plain to require authority. If a private person file a bill claiming something he has no title to, and the Attorney General joins in an information to assist and enforce the same claim, the information must have the same fate as the bill :—

(Lord *Cottenham*.—The Attorney General here sues in a distinct right. He would have a right to file an information to preserve the charity property, if the argument that there is no corporation is right ; but the question now is, whether his information fails because the plaintiffs fail.)

The Attorney General and the plaintiffs seek to enforce the title of the hospital to the property in question ; he does not controvert their right, but asserts it ; he seeks nothing but what his co-plaintiffs seek ; he might, of course, file a new information after the present suit is dismissed.

2. In the event of the House coming to the conclusion that the hospital was duly incorporated, there is another objection to its constitution ; it was not duly endowed. The 4th section of the 39th of *Eliz.* c. 5, provides that no hospital shall be incorporated by force of that act, unless upon the foundation thereof it shall be endowed for ever with lands and tenements (i). The endowment should be simultaneous with the incorporation of the hospital. The original endowment here was the property conveyed by Sir *R. Carr*, by the deed dated the 27th of *March*, 1683. The hospital was not then a corporate

(i) *Vide ante*, p. 405 (note).

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body, for it appears by the entries in the books of the corporation of *Newcastle*, that the deed dated the 26th of *March*, 1683, purporting to incorporate the hospital, was not actually executed under seal until the 16th of *April* following; and if the execution of that deed should be held to have relation back to the day of its date, still the endowment on the 27th, and incorporation on the 26th, would not be simultaneous :—

(*Lord Cottenham*.—The appellants attempt to invalidate their own deed by reference to entries in their own books ! The *Lord Chancellor*.—And here, at the foot of the deed, printed *verbatim* by the appellants in their appendix, we find this entry :—“Taken and acknowledged the 27th of *March*, 35 *Charles 2* (1683), before me, *John Douglas*, master extraordinary in the High Court of Chancery.” That entry, by a public officer, must be taken to be true as against the entries in the appellants’ books, produced for the purpose of invalidating the deed.)

There is no doubt that it was the wish of the parties at the time to incorporate and endow the hospital, but finding that they had not done it effectually, they, with the best intention, probably, induced the officer to make the enrolment of the deed to correspond with the date :—

(*Lord Cottenham*.—Here is a deed 160 years old, and on the face of it is an entry made by a public officer, and

ances to them of the *Etherley* and *Whittle* estates by the deeds of *November* 1683, and *September* 1685, were purely voluntary, and are therefore void under the Statute of Frauds (*k*), as against the subsequent conveyances to *Clutterbuck* and *Johnson*, purchasers for valuable consideration :—

(The *Lord Chancellor*.—Does that doctrine apply to charities founded under an Act of Parliament, the very object of which was to found charities, and to encourage the conveyance of lands to charities so founded ?)

Charity is only a meritorious consideration, not better than love and affection for one's wife and children ; yet a conveyance of lands to them for this consideration only, would be defeated, under the statute, by a subsequent conveyance of the lands by the same person ; *Willats v. Bushy* (*l*), at the Rolls. The same principle, it is submitted, is applicable to conveyances to a charity.

4. The next and most important point is the objection to the decree, by which the respondents are declared entitled to a part of the *Walker* estate on their confirming the sales of the *Etherley* and *Whittle* estates. The decree holds that these estates were well vested in the hospital corporation, and it, in effect, affirms the right of the hospital to alienate them, contrary to the clear and positive prohibition in the 5th section of the act—" provided that no corporation to be founded by force of this act *shall do or suffer to be done any act or thing* whereby any of the lands, &c., of such corporation shall be vested or transferred in or to any other whatsoever." The decree, by affirming the alienation of these estates, in violation of the act, put the corporation of *Newcastle* in a worse, and the hospital corporation in a better, position than either ought to be in. The hospital, instead of following its own

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(*k*) 27 Eliz., c. 4.

(*m*) *Ante*, 405, n.

(*l*) 12 Law, J. (N.S.), ch. 105.

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estates, and recovering them from the alienees, as it certainly might, goes against its benefactors and founders for a part of the *Walker* estate purchased by them; and the decree recognizes their claim. If the hospital had proceeded to recover their estates—admitted to have been improperly sold by the former corporation of *Newcastle*—the purchasers on losing them would have recourse to the deeds and covenants for indemnity given to them by the corporation of *Newcastle*, which, under this decree, may be doubly losers—first, of part of their estate at *Walker* to the hospital, and afterwards of other parts of it which have been conveyed to *Clutterbuck* and *Johnson*, to indemnify them against the claims of the hospital, which claims it is perfectly competent for the hospital at any time to enforce.

5. But supposing the appellants to fail in all the preceding objections, there is another most material objection to the decree, as giving the hospital a portion of the *Walker* estate in the ratio of 3815*l.* to 12,220*l.*, the price paid. The hospital's interest in the *Etherley* and *Whittle* estates extended to the land and surface only, and not to the coal or other mines, which belonged to the corporation of *Newcastle*, and which were as valuable as the surface, as appears by the several leases of the lands and mines. The decree, if right in all other respects, is palpably wrong

in not directing an inquiry as to how much of the 3815*l.*

would be a proper matter for a petition of re-hearing, but it was considered better to have an appeal against the whole decree :—

(*Lord Cottenham*.—It is a rule here, that if an appellant succeeds in a point not brought before the Court below he gets no costs).

But the chief objection on which the appellants rely, is that the decree sanctions an alienation of the charity lands in contravention of the statute. On that point the decree must be reversed : but it is also erroneous in giving the hospital a larger interest in the estates of *Etherley* and *Whittle* than it ever had. The price not only of the mines, but also of a separate property, called *Pig's Hill*, sold with the *Etherley* estate, and certain sums paid to lessees, for their interest in their leases, to make up a free title to the purchasers, should be deducted from the 3815*l.* The hospital concurred in petitions to Parliament for an act in 1716 and 1717, to confirm the sales of their estates, and in lieu thereof to take a rent charge of 185*l.* a-year on the *Walker* estate. The original endowment was not more than 180*l.* a year; it could not legally exceed 200*l.* a year. The hospital should be now held bound by the consent they gave in 1716-17 :—

(*The Lord Chancellor*.—The hospital had no right to enter into any bargain in respect of the charity estates. The Attorney General is a party to this suit, and he protects the charity in its future as well as its present interests).

The hospital's equity for compensation for their sold estates, was as good in 1716 as it is now. They always received from the corporation of *Newcastle* much more than the rents and profits of the *Etherley* and *Whittle* estates. The payments made to them annually, increased from 180*l.* to 200*l.*, then to 400*l.*, and latterly to 600*l.*; whereas the rents of the two estates never exceeded 400*l.*, and do not exceed that sum now.

It is also to be remembered that the *Walker* estate is

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vested in the corporation of *Newcastle*, upon trusts, and that that corporation having purchased the estate, and taken a license to hold it for certain purposes, cannot apply any part of it to other and different purposes, as the decree contemplates.

Mr. *Turner* and Mr. *Purvis* (with whom was Mr. *Blunt*) for the respondents :—

Some of the points urged in argument for the appellants are not raised in the pleadings, nor were they brought under the attention of the Master of the Rolls.

With respect to the applications to Parliament in 1716 and 1717, the respondents stated in their bill that there was some agreement or arrangement between them and the corporation of *Newcastle* in these years to apply for the sanction of the Legislature to accept a rent charge on the *Walker* estate, in lieu of the *Etherley* and *Whittle* estates. The applications did not succeed; they were afterwards renewed, unsuccessfully, by the appellants, in 1720 and 1725, but the respondents did not then join in them, nor in the conveyances of the estates. They seek by their bill such portion only of the *Walker* estate as was purchased by the proceeds of the sales of their own estates; and they also ask to have the property purchased of *Carr*, restored to them. But if the bill should be dismissed on the ground

thing ought to be done for the chatiry; *The Attorney General v. Scott* (n).

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The argument for dismissing the suit altogether was founded on a point of form or misjoinder of parties; a supposed misjoinder of the Attorney General with the hospital, on the ground that the hospital was not duly constituted a corporation, and therefore had no title to sue in that capacity. The argument is unsound; the words "person and persons" in the statute 39 *Eliz.*, are applicable to corporations as well as to individuals. That was Lord *Coke's* opinion (o), and there is no contrary decision or *dictum* :—

(*The Lord Chancellor.*—That commentary of Lord *Coke*, which may be said to be a contemporaneous exposition of the act, has never been questioned; it has been accepted all over the country since his time, and no doubt numerous charitable corporations depend on it. The act itself enumerates the classes who are excepted as incapable of creating corporations; and it also declares, that "such construction is to be put on the act as shall be beneficial and available for the maintenance of the poor" (p). I do not think this House would feel justified in putting a construction on the act, inconsistent with that commentary of Lord *Coke*.

Lord *Cottenham.*—I concur in that view, that we are not likely to overturn Lord *Coke's* opinion on this subject; but that does not relieve the respondents from not having made a case to support their decree. The case stated in their bill proceeds on a supposed agreement with the corporation of *Newcastle* in 1716, to obtain the sanction of Parliament to the sale of their estates.)

The respondents' counsel were continuing their argument, that the hospital was legally founded and endowed:—

(n) 1 Ves., sen. 418.

(p) *Vide ante*, p. 405, note.

(o) 2 Inst. 772.

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(*Lord Campbell*.—All the Lords are clearly of opinion that you may start from this point, that the hospital was well constituted.

The *Lord Chancellor*.—I think we have heard all the arguments that can be adduced on the other side as to that point. Mr. *Kindersley* argued upon the construction of the act, upon its different clauses, and that where a corporation was mentioned, the words adapted to a corporation were used throughout the act, but where founder or founders were mentioned, words not applicable to a corporation were used. The result of that argument amounts to nothing more than this, that the words of the statute were brought in aid of what was considered as the obvious meaning and object of the act. I do not think it is necessary for you to trouble yourself as to that part of the case. And as to the other objection, that there was no good endowment of the hospital, I think that argument failed in point of evidence of the date and enrolment of the deed of *March*, 1683; unless the appellants can vary the facts, they cannot establish that objection. Then as to the point made, that the deed was voluntary; from the very nature of the transaction it was meant to be voluntary—it was an endowment of a charity, and an endowment for charitable objects imports, of necessity, want of pecuniary consideration; you need not argue that point either. We

became trustees or agents for the hospital, and sold it as such trustees. The owners, or *cestui que trusts*, have an option to follow the estates, or the money produced by the sales of them, and vested in the purchase of another estate. The hospital here chooses the latter alternative, and claims a conveyance of part of the purchased estate of *Walker*, bearing the same ratio to the whole as the 3815*l.*, the produce of the sales of these estates, bore to 12,220*l.*, the whole purchase money of the *Walker* estate. The respondents also complain of the condition or direction in the decree to confirm the sales, as that direction was more injurious to them than to the appellants. Apart from that point, and from the allegation in the bill of their concurrence in the sales, the hospital was entitled to the proceeds of the sales; and the money having been applied by their agents or trustees in the purchase of other lands, the hospital had a choice to insist on the 3815*l.*, or on the lands purchased with that sum. The hospital, after receiving the lands purchased with their money, could not, as was alleged on the other side, proceed against the purchasers of their estates—though now they might. A Court of Equity would not hesitate to prevent any such proceeding by injunction; and, therefore, the result of carrying this decree into effect would be, of course, to confirm the title of those purchasers without any direction of that sort; so that if any alteration is to be made in the decree, it should be to strike out the direction to confirm the sale.

The corporation of *Newcastle* contracted for the sale of the charity estates, without any binding authority from the hospital, but with something like an implied assent; an assent given upon the understanding that an act of Parliament would be obtained. Parliament rejected the application, and the matter dropped. In 1716 or 1717, when that took place, the whole matter rested in contract. • No conveyance had been then made by the corporation of *Newcastle* to the purchasers, though they had received a

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part of the purchase money. When Parliament rejected the proposed bill, the matter was restored, as to the charity corporation, to its original right, and the duty of the corporation of *Newcastle* was at once to stay proceedings; and, instead of assuming to make a conveyance of the property, to pay to the purchasers their money, and to restore to the charity the estates which they had contracted to alienate. What course did they take? Knowing that Parliament would not sanction the measure, they assumed, in defiance of Parliament, in the year 1720, to make a conveyance of these charity estates. They retained the monies which the purchasers had before paid them, and received from them the balance of the purchase monies; the receipt for the balance is dated *December, 1720*. That money must, in their hands, be fixed with a trust, and the trust remained affixed to it after it had been applied in the purchase of the *Walker* estate. If the corporation of *Newcastle* had assumed to sell these estates, without any sort of authority from the charity corporation, the purchase monies of these estates would undoubtedly have been subject to a trust in their hand, and the estates purchased with these monies would have been equally subject to that trust. What difference does it make that there had been between the parties some sort of arrangement which was afterwards dropped? They knew that the

considered as abandoned; and that it is the clear result of the evidence in the cause that it was abandoned, and the charity was restored to its original position. But even supposing that not to be the case, it is further submitted that the Attorney General cannot be bound by any arrangement injurious to the charity. Upon what principle could the hospital have alienated this property against the express provisions of the act of Parliament? Would it not be a matter of course, upon an information filed by the Attorney General, to give that relief, and to restore the estates to the charity? If it would, then it must be held that the Attorney General's right cannot be affected by the circumstance of the charity corporation being made co-plaintiffs with him. In *The Attorney General v. Vivian*, the Court of Chancery dealt with the difficulty, caused by the want of title in the plaintiffs, by dismissing their bill, but retaining the information, and founding a decree upon it.

Several matters, which were never mentioned in the Court below, nor in the pleadings, have been urged here in reduction of the claim of the hospital to the full benefit of the 3815*l.* obtained for the *Etherley* and *Whittle* estates; first, the mines under these estates, which were reserved to the vendors out of the conveyances to the hospital—how the corporation of *Newcastle* came to be the owners of the mines, does not at all appear—and, secondly, *Pig's Hill Close*, which was sold to *Johnson* with the *Etherley* estate: And it has been contended that an inquiry ought to have been directed by the decree as to the value of these, and the aggregate amount found ought to be deducted from the 3815*l.* To these inquiries the respondents make no objections.

Mr. *Kindersley* replied.

The *Lord Chancellor*, in the course of the reply, suggested that it would be desirable to put an end to this

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litigation, if it could be done amicably. The corporation of *Newcastle* founded and endowed the hospital, and always contributed most handsomely to its support—to the amount of 500*l.* or 600*l.* a-year latterly.

Mr. *Purvis*.—The counsel for the hospital had all the circumstances under their consideration before the appeal was brought on, and it was their opinion that the appellants did not propose a sufficient sum.

The *Lord Chancellor*.—Would you accept 800*l.* a-year, to be properly settled and secured to the hospital, by way of rent-charge on the *Walker* estate, with the sanction of the Attorney General? The sanction of Parliament also will probably be required.

After some discussion between the Lords and the counsel for both parties, the case was ordered to stand over for judgment, on the understanding that, if the parties could agree on the terms of an arrangement, to be confirmed by act of Parliament, the House would not be called on to give any judgment.

The appellants and respondents, some days afterwards, presented a petition to the House, stating the terms of an arrangement to which they had come by advice of their

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the City of London, the ATTORNEY			16, 22, 26, 27,
GENERAL, and others	- -	<i>Respondents.</i>	and 30.
			July 3, 4, 11
			and 13.
			1845,
			August 8.

In an agreement between King *James I.* and the City of *London*, in 1609, for a grant by the King of lands in *Ireland*, to be planted and colonized by the City; it was stipulated that 20,000*l.* should be advanced, to be expended on the undertaking. The City compulsorily levied that and other sums for the same purpose upon the incorporated companies of *London*. The King afterwards granted a charter creating a corporation (the *Irish* society), the members thereof to be from time to time appointed by the City, for the management of the plantation, and to whom the lands were thereby granted for ever. The greater part of the lands was afterwards divided in severalty between the companies in the proportion of their contributions to the sums levied on them; but the town lands, ferries, and fisheries, were retained by the *Irish* society, who, after applying part of the rents and profits towards the building of churches, schools, and other public purposes beneficial to the plantation, divided the surplus among the companies. One of these filed a bill against the Society and other parties, charging that the Society were trustees for the companies, and were guilty of breaches of trust in applying among their own members large sums in gifts and in payments of travelling and other expenses, and calling on them for an account:—

Trusts for public purposes. Parties interested, subject to the trusts. Account.

Held, that the *Irish* Society were constituted trustees for permanent public purposes independent of the companies, and had a discretion in applying the funds arising from the property retained by them to these purposes: That though they were accountable to the Crown for any neglect of their duty as trustees, and also to the City of *London* for misconduct in the management of the property, they were not accountable to the Companies.

THE appellants are the Master and Wardens of the Guild or Fraternity of the Skinners of the city of *London*, com-

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posing one of the numerous incorporated trade companies of that city, and commonly called "The Skinners' Company." The principal respondents are—1st, the Society of the governor and assistants, in *London*, of the new Plantation in *Ulster*, in *Ireland*, commonly called "The *Irish Society*;" 2dly, the Mayor, Commonalty, and Citizens of the city of *London*; and 3dly, Her Majesty's Attorney General. The Wardens and Commonalty of the Mystery of Mercers, and thirty-nine other incorporated companies of *London* are also respondents on the record—having been made parties defendants in the Court below—but they took no active part in the appeal: they are all in the same interest as the appellants.

The appeal was brought against a decree of the Master of the Rolls (*a*), pronounced in *November*, 1838, dismissing a bill, which was filed by the appellants against all the respondents and other persons since deceased. The bill prayed for a declaration that the appellants and the other incorporated companies of *London*, who had contributed to the expenses of the new Plantation in *Ulster*, were beneficially entitled to the rents and profits of certain town lands, ferries, and fisheries retained under the management of the *Irish Society*, subject to certain payments and charges, and that the *Irish Society* were trustees of the surplus rents and profits for the benefit of the

forfeiture, in consequence of the attainders of the Roman Catholic proprietors in the preceding reign, had come into the possession of the Crown. King *James* being desirous to plant or colonize that part of *Ireland* with Protestants, chiefly from among his *English* and *Scotch* subjects, declared, in the year 1608, the precise nature of his scheme of Plantation, by causing to be printed and published by his Privy Council, "A Collection of Orders and Conditions to be observed by the Undertakers." That publication, hereinafter called "the Printed Book"—after reciting that a survey had been then lately made of the escheated lands, and transmitted to his Majesty, "upon view whereof his Majesty, of his princely bounty, not respecting his own profit, but the public peace and welfare of that kingdom, by the civil plantation of those unreformed and waste countries, is graciously pleased to distribute the said lands to such of his subjects, as well of Great Britain as of *Ireland*, as being of merit and ability, shall seek the same with a mind not only to benefit themselves, but to do service to the Crown and Commonwealth," &c.—proceeded to declare the several proportions of land to be distributed to the Undertakers, the several sorts of Undertakers, the manner of distribution, the rents and the tenures under which the lands were to be held: And it provided that the Undertakers were to build strong courts or banns as fortresses, and to reside for five years; to keep and furnish arms and men for the defence of the settlement, to erect stone or brick houses, form townships, take the oath of supremacy (and not to alien or demise any of their lands to any mere *Irish*, or to any who would not take that oath), and to plant a competent number of *English* and *Scottish* tenants; and it also provided for the foundation of market towns and corporations for the inhabitation and settling of tradesmen and artificers, and for free schools, parishes, and parish churches, &c.

The King appointed commissioners in *July*, 1609—Sir

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Arthur Chichester, then deputy of *Ireland*, being one— and written instructions were given to them for carrying into execution his Majesty's purposes, as declared in the "Printed Book," and other matters touching the Plantation. His Majesty being desirous to engage the Corporation of *London* as Undertakers of part of the escheated lands, heads of the project were drawn up by his Privy Council, entitled "Motives and reasons to induce the city of *London* to undertake the plantation in the north of *Ireland*." This document, after stating "that the ruined city of *Derry*, situated on the river of *Lough Foyle*, and one other place at or near the castle of *Coleraine*, situated on the river *Bann*, seemed the fittest places for the city of *London* to plant," further stated, "that his Majesty may be pleased to grant to these towns not only corporations, with such privileges for their good government as shall be convenient, but also the whole territory and country between them, which is above twenty miles in length, bounded by the sea on the north, the river *Bann* on the east, and the river of *Derry* or *Lough Foyle* on the west; out of which 1000 acres more may be allotted to each of the towns for their commons, rent free; the rest to be planted with such undertakers as the city of *London* shall think good for their best profit, paying only for the same the easy rent of the undertakers. That his Majesty

may be pleased to grant to these towns the benefit of all

“the profits which *London* shall receive by the plantation,” viz., “If multitudes of men were employed proportionately to these commodities, many thousands would be set to work to the great service of the King, strength of the realm, advancement of several trades, and benefit of particular persons, whom the increasing greatness of this City might not only conveniently spare, but also reap a singular commodity by easing themselves of an insupportable burden, which so surcharged all the parts of the city that one tradesman can scarce live by another.” The “Motives and Reasons” concluded with an exhortation to the City to follow “the noble precedent” set by the city of *Bristol* in the time of *Henry II.*, in planting the city of *Dublin*, “desolate by the slaughter of the ancient inhabitants.”

These proposals of the King were discussed at a Court of aldermen, “in the presence of divers selected commoners of the city, warned for the purpose:” And in pursuance of a resolution of that court, precepts were issued to the several city companies, requiring them to assemble a competent number of their gravest and most substantial men to consider the said project. The companies, accordingly, appointed four men from each, as committees to deliberate on the project. These committees communicated their answers in writing to the King’s Privy Council, declining, as was supposed, the undertaking; but that communication being irregular, they afterwards attended at a court of aldermen, and concurred in the appointment of a committee of aldermen and commoners to confer with the privy council on the subject. The result of that conference was, that the city of *London* should send competent persons to view the district for plantation; and accordingly, at a court of common council, held the 1st of *August*, 1609, four citizens were selected for this mission from four of the principal city companies. The report of these “viewers,” presented to the common council the 2d of *December*, 1609, was

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referred to a committee of twelve aldermen and twenty commoners, who made their report thereon the 15th of the same month. They recommended, *first*, as to the sum of money to be expended on the undertaking, that it should only be 15,000*l.*, to be raised "by way of companies, and in companies, by the poll, according to the rate of corn set upon every company, but some of the inferior companies to be spared; yet such as were known able men in these companies, to be set proportionably with men of like ability in other companies:" *Secondly*, as to the lands and privileges to be demanded, that "the *Derry* on the river of *Lough Foyle*, and *Coleraine* on the river *Bann*, should be the sites for two cities to be erected, with 4000 acres of land adjacent to the former, and 3000 to the latter, to be laid out; the rest of the county of *Coleraine*, esteemed at 16,000 acres of temporal lands, to be undertaken." They then defined the nature of the estates, the amount of rent, the quality of the tenure, and the liberties and privileges (in respect of customs and fishings), to be demanded by the Undertakers. They described, *thirdly*, the purposes upon which the 15,000*l.* should be expended in buildings and improvements; and *fourthly*, how the plantation and undertaking should be managed, viz., by advice and direction of a company, constituted in *London*, of persons to be selected by the City for the purpose.

20,000*l.*, and a present levy of 5000*l.*, part thereof, should be raised forthwith by way of companies of the city, in the manner and at the rate before mentioned. The proportions, in which the twelve principal and forty-three minor companies were to contribute, were determined, and precepts, with those sums respectively written on them, were issued by the Lord Mayor to these fifty-five companies, commanding them to proceed to a taxation and levy of these respective sums, and to pay the same to the City Chamberlain as treasurer.

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By articles of agreement, dated the 28th of *January*, 1609, made between the Privy Council on behalf of the King on the one part, and "the Committees appointed by act of common council on behalf of the Mayor and Commonalty of the city of *London* on the other," "it was agreed by the City that the sum of 20,000*l.* should be levied." The articles provided for the building by the City of the city of *Derry* and town of *Coleraine*, and for maintaining the castle of *Culmore*, and they specified the lauds and the privileges to be granted, and on what terms and conditions; which were to the effect:—That 4000 acres adjacent to *Derry* "be laid thereunto; bog and barren mountain to be no part thereof, but to go as waste to that city;" that 3000 acres "adjacent to *Coleraine* be laid thereunto; the rest of the county of *Coleraine*, esteemed at 12,000 acres, undertaken by the city, to be cleared of all particular interests, except the Bishop and Dean of *Derry's* inheritance, and the lands assigned to three or four *Irish* gentlemen, settled there, who were to be freeholders to the City, and to pay a small rent: That the woods, and the ground covered by them, "be wholly to the City; the timber trees to be converted to the use of the Plantation:" That the City shall have the patronage of all the churches in *Derry* and *Coleraine*, and in all the lands to be undertaken by them: That the 7000 acres

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laid to *Derry* and *Coleraine* be in fee farm, at the rent of 53s. 4d., and be with *Derry* and *Coleraine* held of the King in free burgage; the residue of the county to be held of the King in common socage: That the customs of all imports and exports should be enjoyed by the City for ninety-nine years: and the salmon and all other fishing in the rivers *Bann* and *Lough Foyle*, in perpetuity, &c.

This agreement was confirmed by the City by an act of common council, on the 30th *January*, 1609, which also enacted, "that for the better ordering, directing, and effecting of all things touching and concerning the said Plantation, and the business thereunto belonging, there shall be a Company constituted and established within the city of *London*, which shall consist of one governor, one deputy to the governor, and twenty-four assistants; and that the governor and five of the said assistants shall be aldermen of this city of *London*; and Mr. *Recorder* of this city shall be likewise one of the same assistants; and the deputy and the rest of the assistants shall be commoners of the same city." The act then directed the mode of annual election of that Company (the *Irish* Society), and that the same, or any nine of them—the governor or deputy to be one—should have full power and authority to hold courts, and there to treat and determine of all matters concerning the business, and what should be

and 3dly, for the exchange of 2000 acres of land comprised in the said articles (to be annexed to *Coleraine*), for other lands not comprised in them—were agreed to. By an act of common council, dated the 14th of *January*, 1610, it was enacted, that the governor, deputy, and assistants before appointed (the *Irish* society) should have full power to let the fishings specified in the said articles, for a term of seven years, to such persons and at such rents as they should think fit and convenient, for the most benefit and profits of the City; and it was ordered that precepts be sent to every company of the City, to require them to assemble, and advise among themselves whether, &c. (as in the following precepts mentioned).

The precepts which were issued in pursuance of this act, and which were dated the 31st of *January*, 1610, recited, that the King had granted unto the city of *London*, the city of *Derry* and the town of *Coleraine*, with 7000 acres of common land thereunto adjoining, and fishings, and divers other immunities, privileges, and franchises, paying four marks per annum; and that the City had undertaken to dispend, in building houses and fortifications, and for freeing foreign titles, the sum of 20,000*l.*; and that his Majesty had further granted to the City divers other lands in the county of *Coleraine*, and other undertaken lands, to build thereupon, which building was to be performed in such manner as was expressed in “the Printed Book:” “and for as much as the governor and committees for the plantation in *Ireland* are now instantly to take care for the letting and disposing of the said lands in the county of *Coleraine*, and the other lands so undertaken, to be used and managed for the benefit of this City, which would otherwise prove a great hindrance and loss, especially for that the time of the year is now most convenient for the plantation to proceed, yet it is thought fit, that the offer of those lands be first made to the several companies of this City, who have and are to disburse the same, and bear:

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the charges of buildings before mentioned: These are, therefore, to charge and command you, that yourselves, together with the assistants and such other of your company as you shall think fitting, do forthwith assemble together, and advise, whether you will accept of a proportion of the same lands, according to the quantity of your disbursements, to be by you undertaken and managed, according to 'the Printed Book,' for plantation, or that you will refer the letting and disposing thereof to the governor and committees: and that you certify to the governor and committees, in writing under your hands, at the *Guildhall*, on or before the 7th day of *February* next coming, what shall be your full determination therein, to the end the business may the sooner be effected, wherein you are to take advertisement, that your companies are to pay and bear their proportion of the charge of the building, fortifications, and freeing of the titles, whether they accept of the said offer of the lands or no; and also that notwithstanding the acceptance of the lands, you shall likewise still be partakers of all benefits of fishing, with the profits of the towns, and other immunities whatsoever."

By an act of common council, dated the 28th of *February*, 1610, reciting, that eight of the principal, and ten of the inferior, companies had agreed to accept the lands as proposed, and the rest refused, it was enacted, that allot-

the 20,000*l.* was taxed, and that precepts be sent to them all, not only for a present levy and payment of 5000*l.*, but also to require them severally to assemble and advise among themselves, and certify, on the 20th of the said month, to the governor and commissioners for the plantation, whether they would willingly yield to the supply of 10,000*l.*, or be content to lose all the monies already disbursed by them towards the plantation, and pass their right therein to such as would undertake this payment, and discharge them of all other payments thereafter touching the said plantation. Two companies (the Coopers and Brown Bakers) accepted the latter alternative, and the chamberlain of the City was ordered to pay the sums assessed on them towards the supply of the 10,000*l.*, the City to receive all the benefit then due, or that should grow due, to the said companies from the plantation.

On the 29th of *March*, 1613, King *James I.* granted his charter, which, after reciting, among other things, that the mayor, commonalty, and citizens of *London*, had laudably undertaken a considerable part of the plantation in *Ulster*, and were making progress therein, constituted the city of *Derry*, and all the territories and hereditaments thereinafter granted, into one county, to be called the county of *Londonderry*, declared that *Derry* should be called *Londonderry*, defined the extent of that city and of the town of *Coleraine*, incorporated the citizens of *Londonderry*, and declared that they should have a mayor and common council, empowered to make laws and ordinances for their government, so that such laws and ordinances be certified to the society of the governor and assistants of the new plantation in *Ulster*, within four months after the making of the same, to the intent that the said society might ratify them, within six months after the delivery of the certificate, or else within the same time declare the same to be improper. The charter,

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after appointing the first corporate officers of *Londonderry*, proceeded to constitute the *Irish Society*; "for the better ordering, directing, and governing all and all manner of things, for and concerning the citizens and city of *Londonderry*, and the county of *Londonderry*, and the plantation to be made within the same city and county, and other businesses belonging to the same." After incorporating the *Irish Society*, giving them power to purchase, receive, and possess lands, and directing the constitution and mode of election, as mentioned in the act of common council of the 30th of *January*, 1609 (*ante*, p. 432), the charter granted that the members, or any nine of them, whereof the governor or his deputy was to be one, should have full power of assembling and holding a court, and in the same court and meeting "to do, hear, transact, and determine all and all manner of matters and things whatsoever of, for, or concerning the Plantation or government aforesaid:" And also to direct, constitute, and ordain, for and on the part of the City of *London*, "all things, which for or concerning the Plantation, supply, or establishment, constitution, and government of the city of *Londonderry*, and of all other the lands and tenements thereafter granted, should seem to be most profitable and expedient:" And also to send orders and directions from *England* to *Ireland* "for the ordering, directing, and disposing of all and all manner of matters and things whatsoever of or concerning the

to take an oath of office before the Lord Mayor of *London*, and giving them power to elect officers, and for three years to make ordinances and other regulations for the government of the city of *Londonderry*, granted to the said Society and their successors the several ports, towns, and lands (which were described at great length), and all fealty and services, &c., hereditaments, and appurtenances, as amply as the King had the same, with certain specified exceptions; to hold the premises to the only proper use and behoof of the said Society of the Governor and assistants, and their successors for ever; to hold the city of *Londonderry* and the 4000 acres next adjoining upon the *Derry* side, and the town of *Coleraine*, and the 3000 acres to the same adjoining, of the King, in free burgage, as of the castle of *Dublin*; and to hold the rest of the premises of the King, as of his castle of *Dublin*, by fealty only, in free and common socage, rendering the rents therein mentioned. Then followed a covenant by the *Irish Society* to convey certain lands to the Bishop and Dean of *Derry* within a year, to keep and maintain for ever the fort of *Culmore*, to convey certain glebe lands to the incumbents within a year. Provision was then made that the timber growing on the lands of *Glankonkene* and *Killetragh* should for ever after be converted towards the Plantation and the building of houses and edifices, to be made as therein mentioned, and to be spent towards other necessary uses for the kingdom of *Ireland*, in the same kingdom, and not for any other cause to be merchandised or sold. The customs were then granted to the *Irish Society* for ninety-nine years, at a rent of 13s. 4d.: the office of Admiral was granted for ever, on the coast or shores of *Tyrconnel*, *Coleraine*, and county of *Londonderry*; and to these were added various other powers and privileges.

The charter made numerous regulations for the municipal government of the city of *Londonderry*; and by

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another charter, similar provisions were made for the town of *Coleraine*.

The two sums of 20,000*l.* and 10,000*l.*, that had been raised by the City from the companies, having been expended on the Plantation, previously to the date of the charter, a further sum of 10,000*l.* was, by act of common council, dated the 30th of *April*, 1613, directed to be levied in like manner, and for the same purposes. The division of the lands among the several companies becoming again the subject of consideration at that council, it was enacted, "that every of the said companies should have its several share and proportion of the lands, according to the monies by them disbursed, according to the goodness or badness thereof, the same lands to lie together, and not dispersedly in several places; and that where the lands were bad, an allowance should be made in the quantity, so that no prejudice might happen to any company in the allotting of the lands."

On communication of the King's pleasure by the Recorder and the Governor of the *Irish* Society, to a Court of common council of the City, held on the 24th of *June*, 1613, it was ordered, "that as well certain walls and fortifications, as also certain houses in *Derry*, should be raised and built up together, and in such manner and form as the committees (the *Irish* Society) appointed for the said

after shall be offered to the further consideration of this Court), that some great and worthy magistrate of this City, accompanied and assisted by some commoner of special countenance and credit, should be sent into those parts, on the behalf of this City, to take exact notice, view, and account of the whole work of Plantation, and of every circumstance and thing appertaining thereunto," it was enacted, that "*George Smithies*, alderman, and *Mathias Springham*, merchant tailor, should prepare, as soon as conveniently they could, to take their journey to *Ireland*; and in the meantime to confer with the Governor, deputy governor, and assistants of the *Irish Society* for their better instruction, and to inform themselves of the things necessary to be remembered in their negotiation; and during their negotiation to take an exact view and account of the Plantation, and of all works and other things whatever done, and to be done, and of all disbursements concerning the same, as also to judge, control, place, displace, dispose, redress, reform, correct, and direct all persons employed for the City's use, disbursements, and service in and about the Plantation, and generally to do and execute every further act which to them might be thought meet, for the bettering, ordering, and governing the Plantation, and the affairs concerning the same, to the intent that, upon their return and relation of their proceedings, this Court (of common council) might grow to such final resolution, touching the Plantation, as should be thought fit and most convenient:" And it was ordered that the charges of the negotiation should be defrayed by the *Irish Society* out of the general stock of the Plantation.

These commissioners, having proceeded on the mission, made their report to a Court of common council of the City, on the 8th of *November*, 1613. The report, after stating, that the commissioners had corrected various abuses which had occurred in the management of the Plantation, and had granted leases of the

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fisheries and of the ferry of *Derry*, and of some of the lands thereto annexed, proceeded thus: "Whereas it was generally desired that a division should be made of all the lands by and among the several companies undertaking in this Plantation, we have first viewed the lands, and carefully inquired after the true value of every balliboe, and thereupon with great care, and with the assistance and advice of the gentlemen of the country, the City's agents and surveyors, proceeded to make an equal division of the land into twelve parts, wherein we have used our best skill and diligence, and have done the same as equally as possibly we could devise, the form of which division we have here brought you, together with the plot of the same. But for the city of *Londonderry* and the 4000 acres there, and the town of *Coleraine*, and the 3000 acres appointed to the same, the ferries, and the fishings, we are of opinion that a division cannot be fitly made of them, but the rents and profits of them may be divided, and go amongst the several companies; and we advise that upon the division it be provided, that, where a proportion of land shall want timber to build with, the company to whose share it shall fall may have sufficient timber out of the woods next adjoining, and fittest for that use, to be assigned to them by the City's agents."

The report was in all points approved of, and accepted by the Court of common council. And at another Court

contributed that part, should associate to itself so many minor companies whose contributions, together with its own, made up that sum. The scheme of division so proposed by the Governor was assented to by all parties, and the sword-bearer of the City was chosen to draw the lots on behalf of the twelve principal companies; and they were drawn in this order:—the Goldsmiths, Grocers, Fishmongers, Haberdashers, Clothworkers, Merchant Tailors, Ironmongers, Mercers, Vintners, Salters, Drapers, and Skinners: “After all which done, information was given to the same Court by the Governor and Assistants of the *Irish Society*, that all the money formerly levied towards that charge is altogether issued, and that, notwithstanding the companies had their particular shares of land, which was to be managed by themselves severally, the general work for the building of the rest of the towns and fortifications was to be done at the general charge, and therefore that a further supply must, of necessity, with all expedition, be made and provided to proceed on the business;” and therefore it was enacted, that a present taxation should be made of the further sum of 5,000*l.*, which was accordingly ordered to be levied and raised of the several companies. “And it was also ordered that conveyances of the lands allotted to the several companies should be made by the Mayor, commonalty, and citizens of this City, by the advice of the Recorder, in such manner as the committees of Plantation should think fit.”

Possession was taken by the companies of the lands allotted to them, and, before any conveyances were made to them, they erected buildings and made various outlays in improvements.

In *September* 1615 the King, by letters patent, granted to the *Irish Society* licence to alienate, and to the twelve companies licence to hold in mortmain such lands as the *Irish Society* should grant to them. The patent contained a recital “that the divers companies, corporations, and fra-

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ternities within the city of *London*, in testimony of their true obedience to the King, and for advancing his desires in furthering the works of Plantation begun by the Mayor, commonalty, and citizens of the City, &c., had disbursed, expended, and bestowed divers great sums of money for and towards the building, fortifying, planting, strengthening, and improving the city of *Derry* and the town of *Coleraine*, and some parts of other lands, and were willing and intended, so far as to them should seem convenient, to be at further charge for the planting and improving of other lands, &c.; and for speedier proceeding therein, were desirous to have conveyances of the land they intended to build on, &c.; therefore, and to the end that the several companies might be the better encouraged and enabled to perfect the intended Plantation, and in future times reap some gain and benefit of their great travails and expense taken and bestowed therein;" his Majesty granted the licence.

In the years 1616-17, the lands allotted to the companies were conveyed to them by the *Irish* Society, in this way: first, each lot was by deed poll, under seal of the Society, created into a manor, and the manor and lands were then granted by indenture of feoffment between the Society and each company, reserving to the Society a certain rent, and all timber, all fishing, and hawking, &c.; and all salmon, &c., in the rivers *Bann* and *Lough*
Ferry and the beds of said rivers, &c. The term here

there had not gone on as was implied by the articles of Plantation; that the lands annexed to that city and to *Coleraine* were not allotted for the benefit of the inhabitants, &c. These complaints were renewed in 1625, the first year of *Charles* the First's reign, with threats of recalling the charter granted by his predecessor. And for that purpose the Attorney General, in 1632, filed an information in the Star Chamber against the Corporation of *London*, to which the *Irish Society* and others were by amendment made defendants. The information charged them, among other things, with the deceitful and undue procuring of the charter of *James*, with wilful breach of the articles agreed upon between the Privy Council and the committees appointed by the City on the 28th of *January*, 1609, and with the wilful breach of trust which the King had reposed in them. During the proceedings it was insisted on by the City that they had nothing to do with the Plantation, and that their name was used merely for the transaction of affairs, and for the levying of monies upon the companies for the Plantation. This point was overruled, and the Court having adjudged that many offences, both of omission and commission, had been done, inflicted upon the City of *London* and upon the *Irish Society* a fine of 70,000*l.*, and decreed that their interests should be surrendered, and the charter brought into Court to be cancelled; and after reciting that the greater part of the lands was, by the Society, passed over to divers companies of the City, and by them demised to their farmers, who were not defendants to the suit, and therefore not liable to the censure of the Court, it was directed, that if the companies and their farmers should not, in pursuance of the intention of the sentence, surrender their estates, the Attorney General should exhibit an information, and bring them also to the judgment of the Court.

An information was accordingly filed against the twelve companies, but was not proceeded with, nor were

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any steps taken for executing the decree of the Star Chamber. In 1636 the City of *London* presented a petition to the King, which, after stating among other things the incorporation of the *Irish Society* by King *James's* charter and the grant thereby made to that Society, "of the county of *Londonderry*, and other lands and possessions there, *which grant was in trust for the several companies of London, and the particular men that disbursed the monies towards the Plantation,*" and that by the said charter the said Society should be yearly elected by the City of *London*, prayed that they might be at liberty, at their next common council, to make such election. The prayer was granted, and new officers and assistants of the Society were elected, as before the repeal of the charter. A further negotiation was carried on between the King and the City for a compromise of all matters in difference between them, including the Star Chamber decree; and it was ultimately agreed, on behalf of the King, that the decree should be discharged, the fine of 70,000*l.* remitted, and other matters, should be conceded by his Majesty, on the City's surrendering the lands, fishings, and hereditaments granted by King *James's* charter, and paying his Majesty a sum of 12,000*l.* The City, after consideration, declined to comply with these terms, except the payment of the 12,000*l.* The City afterwards presented a petition to the House of

the petition, resolved that the proceedings and decree in the Star Chamber were unjust and unlawful, and that the parties thereby affected should be discharged therefrom, and restored to the same state they were in before the said proceedings. King *Charles* had about the same time declared his assent to a restoration of the lands to the City, but the civil wars which then ensued put an end to all further progress in the negotiations.

Application for a restoration was made to the Protector *Cromwell*, who, in 1656, by letters patent, renewed the grant in the terms of *James* the First's charter.

King *Charles* II., soon after his restoration, granted a charter, dated the 10th of *April*, 1662, under which the *Irish* Society now exists, and from which the subsisting titles to the lands and estates thereby granted are derived. This charter recited the charter of *James*, and the grants of lands made to the companies by the *Irish* Society, which was constituted under that charter, and that the Society retained "in its own hands such parts of the tenements and hereditaments, as were not properly divisible, for defraying the charge of the general operation of the said Plantation;" it further recited the repeal of the charter, the promise made by King *Charles* I. to restore to the said Society and the other companies the lands and privileges in the charter mentioned, and that it appeared that the said Society and other companies of the City had expended very great sums of money in building and planting of the county of *Londonderry* and *Coleraine*, and it then proceeded to express that the present grant was made to the intent that the said Society, or some other society, by the present letters patent to be created, and the companies of the City of *London*, and their respective assigns and under-tenants might, according to their former several rights and interests therein, be restored to all the estates vested in them by force of the former letters

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patent; and to the intent that there might be a new society of the new Plantation in *Ulster*, consisting of a like number of citizens of the City of *London* as the former society, and a new incorporation of the city of *Derry*, and for the further and better settling and planting of the said county, towns, and places with trade and inhabitants.

The charter then proceeded to establish the county of *Londonderry*, and to incorporate the city of *Londonderry*, with power to make bye-laws, to be approved by the *Irish Society* (as in the charter of *James I.*); it constituted that Society a body corporate, "for the better ordering, directing, and governing all and all manner of things," &c., giving them all the powers and in the same terms that the former charter had given (*ante*, p. 436); and, after various provisions, it granted and confirmed to the said Society the city of *Londonderry* and town of *Coleraine*, and the town lands and other hereditaments, as fully as they had been granted to them by the charter of *James*, to hold them to their own proper use for ever, by the same tenures as they held them under that charter. Some provisions of a temporary nature in the charter of *James* were omitted in that of *Charles II.*, and some small additions also were made in the latter, the interval of fifty years having made some differ-

charter of *Charles II.*, following the same course that was pursued after the grant made by the charter of *James*, executed deeds, creating the same manors that had been created on the former occasion, and by other deeds conveyed the manors, and the lands and hereditaments appertaining to them, to the same twelve companies respectively, with the same exceptions, reservations, and covenants that were contained in the former deeds of conveyance. These companies, or persons claiming under them, have ever since been in the possession or receipt of the rents and profits of the lands and hereditaments so conveyed; and the *Irish Society* have ever since continued in the exclusive possession or receipt of the rents and profits of the ferries, fisheries, and town lands annexed to *Londonderry* and *Coleraine* (b). They have dealt with the property as absolute owners, and applied parts of the rents and profits to the general purposes of the Plantation, as in building and endowing schools, churches, and chapels; in building town halls, gaols, and bridges, &c.; in payments to school-masters, and other payments called charitable purposes. They have also, from time to time, stated a surplus to be in their hands, and paid part of that surplus, generally in round sums, to the twelve companies of *London*. In the first years after the grant of the lands, all the monies that were from time to time required for the purposes of the Plantation were levied on the City companies by the City. Afterwards, when money was wanted, the *Irish Society* applied not to the City to raise it by levies, as before, but to the companies themselves for voluntary

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(b) The customs on imports and exports granted to the Society by the charters, were, in 1665, sold by them to the King for 6000*l.*, and they were then also relieved from maintaining the fort of *Calmore*, and keeping up a garrison there, in consideration of a perpetual rent charge of 200*l.* a-year, payable to the governor of the fort.

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contributions; and on another occasion, in which it became necessary to the Society to make a statement respecting the timber on the property, it represented itself to be entrusted for the companies, and seised of a considerable salmon fishery, and other estates in the county of *Londonderry, in trust for the companies of the City*, over and besides the several proportions of lands which had been granted to them. The Society have on other occasions stated themselves to be "trustees" for the companies; and on another occasion they stated themselves to be accountable only to the twelve chief companies of *London*, to which all the surplus funds under their management not disposed of in the performance of the duties which the charter imposed upon them, were regularly transferred and paid.

The appellants' bill, filed in 1832—amended in 1834—against the *Irish* Society, the Corporation of the City of *London*, and the several companies of the City, after stating the general history of the Plantation, and the titles and claims of the several parties, charged the *Irish* Society with various misapplications of the monies received by them from the rents and profits, and with mismanagement of the estates vested in them, upon trust, specifying particular acts of mismanagement, such as granting, in 1766 and lately, leases in perpetuity or for long terms, of parts

of plate for some, and in paying for the portraits of others; in defraying the expenses of some of the members on their travels to and in *Ireland*; and in contributing large sums to the corporations of *Londonderry* and *Coleraine* for the purposes of elections of members of Parliament.

The bill prayed that it might be declared, that the appellants, and the other companies who contributed to the expenses of the Plantation of *Ulster*, and to whom, and for whose benefit, the lands and hereditaments were allotted and conveyed, were beneficially entitled to the rents and profits of the ferries, fisheries, and town lands, subject only to the payment of certain yearly sums to the Bishop of *Derry* and the Governor of *Culmore* Castle, and to the charges, if any, to which the same were subject under the articles of agreement (of 1609), and the said charters respectively; and that it might be declared that the Society were trustees of the same rents and profits, subject as aforesaid, for the appellants and the other companies; and that an account might be taken of the said rents and profits which had been received by the Society; and that a partition of the ferries, fisheries, and town lands, between the appellants and the other companies, might be decreed; or if the Court should be of opinion that such partition ought not to be made, then that the Society might be removed from being trustees of them, and that other trustees might be appointed, and that in the meantime a receiver of the rents and profits might be appointed, and the Society restrained from receiving the same.

The *Irish* Society, the Corporation of the City of *London*, and the other defendants to the bill, having put in their answers thereto, the appellants applied to the Court of Chancery for an order on the Society to pay into Court the surplus rents and profits then in their hands, and for

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the appointment of a receiver. That application was refused (c). In consequence of some observations made by the Lord Chancellor on that occasion, the appellants filed a supplemental bill, bringing the Attorney General before the Court as a party defendant in the cause, and he put in his answer to that bill. The defence made by that and the other answers will hereinafter appear in the arguments of counsel for the respective parties.

The original and supplemental causes having been at issue, all the documents before referred to, and others not necessary to be stated, were admitted in evidence, and several witnesses were examined, and admissions made on behalf of the appellants and respondents. From the accounts of receipts and disbursements of the Society given in evidence, it appeared that in the five years next preceding the filing of the original bill—each year ending in *March*—the receipts of the Society were, in round sums, as follows :—

	1828.	1829.	1830.	1831.	1832.
Rental (of lands and ferries) . . .	£ 6007	£ 6030	£ 6842	£ 8261 *	£ 6211
Fisheries . . .	1252	1252	1252	1252	1252
Total income for each year	7259	7282	8094	10,513	7463

	1828.	1829.	1830.	1831.	1832.
Permanent payments and Quit Rents (Ireland) .	£ 703	£ 703	£ 703	£ 704	£ 662
Expenses of schools (Ireland)	542	382	439	438	468
Salaries, &c. (Ireland)	666	629	629	591	693
Salaries and gratuities (England)	705	820	721	898	611
Charitable donations (Ireland)	208	349	195	530	1,556 *
Donations (England)	—	41	52	525	—
Abatements to tenants	109	109	109	109	109
Law expenses	662	—	1,697	262	3,460 †
Incidental expenses (Ireland)	826	722	521	620	199
Incidental expenses (England)	526	354	100	556	295
Expenses of deputation	166	—	650	793	—
Tavern expenses	498	555	357	601	452
Allowance to members	473	506	424	615	593
Irish chamber expenses	38	25	75	183	—
Divided amongst the 12 companies	1,149	1,149	1,200	3,498	—
Total disbursements for each year	7,071	6,344	7,872	10,923	9,098

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The cause was heard by the Master of the Rolls, in 1838, and by the decree then made it was ordered that the appellants' bills should be dismissed, with costs as against the principal respondents, and without costs as against the *London Companies*.

The appeal was brought against that decree.

The *Solicitor General* (Sir *W. Follett*) and Mr. *Pemberton Leigh* (with whom was Mr. *Lloyd*) for the appellants :—

The question in this appeal lies chiefly between the *Irish Society* and the incorporated Companies of the

* This sum included 52*l.* 10*s.*, contributed for the *Derry* races.

† It was said that this sum was expended in a contested election of the late Alderman *Thorpe* for Coleraine.

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City of *London*, including the appellants. Most of those companies, though made defendants in the suit, make common cause with the appellants. The corporation of *London* were made defendants because the interests of two of the minor companies, the Coopers and Brown Bakers, are vested in them. The Attorney General was brought before the Court by supplemental bill, in consequence of an opinion expressed by the Lord Chancellor on an application for a receiver, that the trusts set up by the *Irish Society* are of a public nature, in which the Crown is interested; but if the appellants are right in their view of the case, the Crown has no interest in it.

The appellants allege in their bill that the *Irish Society* hold certain portions of the property in the north of *Ireland*, which was granted by King *James I.* to the City of *London*, and not divided among the City companies; and that they hold the same, subject to certain specific charges (200*l.* a year to the Governor of *Culmore*, and 262*l.* to the Bishop of *Derry*), as trustees for the City companies, who contributed to the Plantation. The prayer of the bill was grounded on that allegation, and this House is now asked to declare that the *Society* are trustees for the companies, and ought to render to them an account of the rents and profits of the property. The *Irish Society*, on the other hand, claim a right to apply the rents

plain of mismanagement of the property, of misapplication of the rents, and they refer to various instances of improper expenditure.

There is no question that the King's object in making grants of the escheated lands in the six counties of *Ulster*, to his *English* and *Scottish* subjects, was an object of public policy; but there was no trust or condition of any sort imposed on the grantees, beyond the specific conditions expressed in the "Printed Book," to which they were all bound to conform; and it is equally clear that the public nature of the object which the King had in view, applied as much to the lands that were granted to private undertakers in the other five counties, as to those which were granted to the City of *London* in the county of *Londonderry*. But it is not even suggested that any trust was imposed on the lands which are held by the private settlers, or on those which were granted to the City of *London*, and are now held by the companies themselves: indeed to impose any undefined trust upon them, would defeat the King's object, because no one would undertake the Plantation on such terms. The Plantation did not proceed so rapidly or so successfully as the King expected, and therefore he was more inclined to hold out inducements to undertakers, than to discourage them by subjecting them to vague conditions. It was in that spirit that he proposed the "Motives and Reasons to induce the City of *London* to undertake the Plantation," giving a most flourishing description of the "convenience," and "productions," and "commodities" of the country, and of the extraordinary "profits the City would make"—such a description as a party anxious to induce persons to embark in the speculation was likely to give. Is it not perfectly clear, from the "Printed Book," and from the publication of the "Motives and Reasons," that the King's only object was to get persons of substance from *England* and *Scotland* to take grants of the vacant lands in *Ireland*, and

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settle upon them? There is not one word in these several documents importing a trust, and it is impossible to suppose his Majesty contemplated any public trust to be annexed to these grants inconsistent with the full beneficial enjoyment of them.

In the articles of the 28th of *January*, 1609, which constitute the contract between the King and the City of *London*, there is no clause or word even to justify the pretension of the *Irish* Society to an unlimited discretion in the application of the income of the part of the Plantation, which remained under their management, to public or charitable purposes. The nature of the original project, and the mode adopted for carrying it into execution, by means of private enterprise at the expense of individuals, negative the existence of any public trust, and of any obligation whatever, except the definite obligations expressed in the articles. The King's object, which is admitted to have been the public good and the benefit of *Ireland*, was to be attained by the taking and planting of the waste lands by *English* and *Scotch* adventurers; there is nothing in the articles inconsistent with that conclusion, and they contain no stipulations from which, either directly or by just inference, any obligation arises to apply any part of the rents and profits to public purposes. With the exception of the clause relating to the

rents and profits, if they were ever specifically liable to the performance of them, have long ceased to be so. The charter of King *James* made no change in the relation of the Crown and the City of *London*, in regard to the Plantation, or the beneficial interest therein: It did not introduce a new contract or arrangement with respect to the hereditaments granted, but was a performance, in part, of a subsisting one: It contained no declaration of trust; nor, with the exception of the woods before mentioned, any terms at all inconsistent with the freest beneficial enjoyment.

All the negotiations respecting the settlement of the county of *Londonderry* were between the Crown and the Corporation of the City of *London*, which corporation was, at that time, entirely composed of persons who were members of the great Companies of the City. The common council was elected by the liverymen of these companies; the electors and elected were members of the companies. The Corporation of the City represented the companies in these negotiations, and never professed or intended to advance any part of the corporate funds for the purposes of the Plantation. The money was all advanced by the companies, and it was for them that the grant of the lands was taken from the Crown by the Corporation of *London* to the *Irish* Society, a body appointed by the Corporation for the management of the undertaking. Every step in the progress of the negotiations was communicated to the companies, who were the real parties represented by the Corporation. That is made quite evident by the proceedings at the court of aldermen, at which the King's proposals were read, by the precepts issued by those courts to the several companies, and by the consequential acts of the companies. The articles of agreement between the King's Privy Council and the Corporation of *London*, which form the basis of the grant, make no mention of any such body as the *Irish* Society; but at Courts of Com-

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mon Council of the City, it was resolved that the City's part of the Plantation in *Ireland* should be managed by agents of the City in *London*, and accordingly a committee, consisting of a Governor, Deputy Governor, and twenty-four Assistants were elected for that purpose, and they were afterwards, on the suggestion of the corporation of *London*, incorporated by the King's charter. They were originally appointed at a Court of Common Council, and they are at the present time elected annually at that Court by the citizens of *London*, being themselves such citizens, and members also of the various City Companies. They were and are the agents constituted by the City for the more convenient management of the property in *Ireland*. How else could the property be managed before it was divided among the companies, who after the division managed their respective allotments by their respective agents? But the town lands, ferries, and fisheries, which are the subject of this suit, not being divisible, continued to be managed by the *Irish Society* as the agents of the City, and for the benefit of the City Companies, subject only to the two annual payments to the Bishop of *Derry* and Governor of *Culmore*.

The *Irish Society* never, prior to the filing of the bill in this case, attempted to assert; never pretended that they were not trustees for the City Companies, or that they had any right paramount to them in the property in their hands, and although they were constituted a permanent body to manage the property for the citizens of *London*, the citizens themselves sometimes gave directions. It appears that at a Court of Common Council, held the 14th of *June*, 1613, it "was thought fit, as well for the general satisfaction of the several Companies of the City who have undertaken the said work, as for other affairs," that commissioners should be sent "to take an exact view and account of the Plantation, and of all works done and to be done, and of all disbursements concerning

the same, as also to judge, control, place and displace, correct and direct all persons employed for the City's use, disbursements, and service in and about the Plantation" (d). These commissioners in their report, read at a Court of Common Council the 8th of *November*, say that they had let the fishings for three years for 866*l.*, a higher value than they were before let for, and then they recommend how the lands should be divided among the companies; "but for the city of *Londonderry* and the 4000 acres there, and the town of *Coleraine* and the 3000 appointed to the same, the ferries and the fishings, we are of opinion that a division cannot be fitly made of them, but *the rents and profits of them may be divided, and go amongst the several companies.*" Does that report, which was adopted by the Corporation of *London*, show that the undivided property, which remained in the hands of the *Irish Society*, was held by them as trustees for undefined public purposes, and not for the benefit of the City Companies? No trace can be discovered in the articles of agreement, or in the charters, of any distinction between the divided and undivided lands; if there is a public trust imposed on one portion of them, it must be imposed on all. The Crown granted all the lands, without any declaration of trust, to the *Irish Society*, and the *Irish Society*, after the division of the lands was made at a Court of Common Council, conveyed the several allotments to the respective companies, who had just then got a licence from the Crown to hold them in mortmain.

In the arbitrary proceedings and decree of the Star Chamber, in 1636, there is not, among the numerous charges made, any allegation that any portion of the property granted by the charter to the City of *London*, was subject to a trust to the Crown. If any trust for the Crown or public purposes had been annexed to the

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(d) *Vide ante*, pp. 438, 439, 440.

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grant, would the promoters of these unjust proceedings omit to allege a breach of the trust? No allegation of that kind was made. The allegations were, that the grant was unduly obtained from the Crown; that far more land was taken by the City than the Crown intended to grant; that the City had not complied with the conditions in the articles of agreement between the City and the Commissioners on behalf of the Privy Council; and that the incorporation of the *Irish Society* was inserted in the charter fraudulently, without any mention being made of them in the articles. The City excused themselves by asserting that they had nothing to do with the Plantation; that they had been acting only for the companies; but the decree held them to be fit defendants, for that the contract had been made with them, and they were in fact the undertakers, as was evidenced by the various acts of their Common Councils.

In a petition which the City soon afterwards presented to the King, they stated that his royal father had incorporated the *Irish Society*, and granted to that corporation the city of *Londonderry* and other lands, "which grant was in trust for the several companies of *London*, and the particular men that disbursed the monies towards the Plantation" (c). Is not this another document which entirely negatives the pretences now set up by the Corpo-

therefore prayed to be allowed to elect the Society. Now if that Society had been constituted as trustees for the Crown and for public purposes, would the petitioners omit to state that as a ground for keeping up the Society? That was a proper opportunity for the City to represent that the Society was established, not to hold the lands in trust for the City companies, but for seeing to the well ordering of the Plantation. The City could not truly make any such statement, and no such statement is found in the petition, nor in any of the various proceedings that followed for the restoration of the charter and of the property. The charter of *Charles* the Second created no new purpose, but was a simple restoration of all the parties to the situation in which they were under the former charter.

The *Irish* Society have also, on various occasions, represented themselves to be trustees of the property for the twelve companies, as in the proceedings in the Star Chamber from 1631 to 1636; in the proceedings afterwards taken for restoration of the charter; in their answer to a bill filed against them by the Bishop of *Derry* in 1683, for rent of his fisheries, and in cases laid before their counsel in contests with the Corporation of *London*, and with several other parties: in fact, they never represented the contrary until this suit was begun. In 1689, after the memorable siege of *Derry*, an application was made to the Society for pecuniary assistance to rebuild the shattered houses of that city, when the Society answered that they had always distributed their revenues to the twelve companies of *London* as soon as the same were received, and being then out of cash, they were not able to grant the assistance that was asked; but they applied to the companies for an advance of 100*l.* from each, and the companies complied. Again, in 1729, there being great distress in the north of *Ireland*, the Society applied to the companies for separate contributions for relief, when

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the companies agreed that the Society should make one contribution for all the companies. Whenever any application of those revenues was to be made to charity or other public purposes, a distinct communication was made by the Society to the companies, because the Society, though representing the companies in some respects, had no authority of themselves to dispose of the revenues, except in discharge of the specific burdens charged on them.

The *Irish* Society have never claimed to be beneficially interested in this property. They distinctly state in their answer that they claim no beneficial interest in it; they admit the interests of the City companies in the surplus revenues remaining, after the application of such portions of them as they consider they have an absolute discretion to apply to prior purposes—purposes undefined in amount and uncertain in object—and the Master of the Rolls, adopting their views, held that the Court had no jurisdiction to compel them to account. There is no case in which parties admitted to be *cestuis que trusts* of a surplus of revenues, which are administered by parties who admit themselves to be trustees, have had their bill, calling for an account of the surplus, dismissed. The argument of the Attorney General in the Court below, and in his printed case here—that the appellants have no interest in this property, that the whole annual income of it is devoted by the Royal charters to public purposes, and that the participation of the companies in it, at any time, was repugnant to the charters—is consistent, and if that argument can be maintained, the decree is perfectly right; but the principle of that argument is in direct opposition, not only to the admissions of the parties against whom the account is sought, but also to every document put in evidence in the cause, as well as to the usage which prevailed from the earliest time to the latest.

The origin of the *Irish* Society may be traced to the report of the four citizens, who, upon the acceptance of

the King's proposals by the City of *London*, were deputed to view the district for plantation, and who recommended in their report that the undertaking should be managed by a company, constituted in *London*, of persons to be selected by the City for the purpose (*f*). They were to be mere agents and managers for the City and the City companies. There is no mention of the Society in the articles of agreement of the 28th of *January*, 1609, between the King and the committees of the City, which formed the contract between the Crown and the companies respecting the whole work of plantation, and which have never been altered or varied in any material part. They contained no provision for the constitution of the *Irish Society*, nor any stipulation that any part of the lands for the Plantation should be vested in trustees for the Crown for indefinite public purposes, nor that one shilling of the revenues thereof should be directed to any purpose except such as were stated in the articles. They provided for the building of the city of *Derry* and town of *Coleraine*, and other purposes, for which the sum of 20,000*l.* was to be advanced. There was no public trust affixed to the property, which was the subject of sale on one side and purchase on the other, upon expressly defined conditions. At a Court of Common Council, held two days after the execution of the articles, it was resolved to appoint a company of citizens "for the better ordering, directing, and effecting all things touching the Plantation." That resolution was the germ of the *Irish Society*. The Crown was not a party to the original appointment of the Society; the City of *London*, representing the several companies, appointed the Society out of the members of the companies to act for the companies in the management of their property; and that that was the object for which the Society was constituted, is made more evident by the

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(*f*) *Ante*, pp. 429, 430.

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act of Common Council of the 14th of *January*, 1610, which gave "the Governor, Deputy, and Assistants, heretofore established by act of Common Council for the intended Plantation, full power and authority to let all the fishings specified in the articles, &c., for the term of seven years, for such rent as they in their discretion shall think fit and convenient for the most benefit and profits of this City" (g). The same Court of Common Council ordered precepts to be sent to the several companies of the City, to require them "to advise among themselves whether they would agree to accept lands in lieu of monies disbursed, or to be disbursed, by them on the Plantation, and so to build and plant the same at their own cost, or else whether they would refer the letting of the lands and the management of the whole business to the said Society?" The precepts that were issued to the companies, in pursuance of that order, informed the companies that whether they accepted the offer of the lands or not, they should "still pay their proportion of the charge of the buildings, fortifications and freeing of titles" (the purposes for which the 20,000*l.* were to be advanced), "and also that, even though they should accept the lands, they should likewise be still partakers of all the benefits of the fishings, with the profits of the towns, and other immunities whatsoever" (h).

This was the first suggestion of the retention of the

with the Crown that they were to be vested in the Society in trust for public purposes.

With respect to any claim on the part of the City of *London*, there are frequent declarations by the City that the entire and absolute beneficial interest, not only in the several proportions conveyed to the companies, but in the ferries, fisheries, and town lands belonged to the companies. These declarations were made under such circumstances as not to import a gift, and they are founded upon the fact, that the whole of the contributions for the purchase and establishment of the Plantation were drawn from the companies; nor are these declarations confined to a period or to circumstances of pressure and difficulty, when the City of *London* might be anxious, by disclaiming all interest, to escape from the responsibilities of the undertaking, but they were made invariably, and at all times. The interference of the City of *London* at the outset with the works and establishment of the Plantation, is to be referred to their liabilities as the nominal contractors with the King, to their substantially representing the interests of the companies, and to the facilities afforded by the constitution of the Corporation of the City of *London*, for superintending and directing the execution of the work.

The alleged public or charitable trust, according to the representation of its character by all the respondents, and according to the proof of it afforded by those acts of charity and bounty on the part of the *Irish Society*, on which the respondents rely, is such a trust as cannot be executed or recognized by a Court of Equity: it is uncertain and indefinite in its objects and subject, and is therefore ineffectual and nugatory. And it not being denied that the companies are entitled to the surplus rents and profits, their right to the whole is the necessary consequence of the failure of the alleged trust.

But even assuming that the *Irish Society*, with no

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other rule or restraint than its own discretion, is entitled to apply any part of the rents and profits of the hereditaments in question to public or charitable purposes, yet the appellants, as one of the parties to whom, *ex concessu*, the surplus belongs, are entitled to inquire into the application of the rents and profits, and to have a remedy for plain breaches of trust. In this respect the appellants are at least entitled upon their bill and the evidence in the cause to a decree for an account of the receipts and payments of the *Irish Society*, upon which many *items* of expenditure, involving breaches of trust, would be disallowed. To obtain this relief the appellants conceive that they have not mistaken the jurisdiction to which they ought to resort. The visitatorial jurisdiction (if any) conferred by the charter on the City of *London*, is not an adequate or appropriate jurisdiction for the matter complained of; and if the City of *London* has a competency in point of jurisdiction, it can neither afford an effectual remedy for the past, nor a reasonable security against future abuses in the application of the funds in question. With the exception of the visitatorial jurisdiction of the City of *London*, which cannot oust the general jurisdiction of the Superior Courts, and the competency of which the appellants deny, there is no tribunal but the Court of Chancery which can adjudicate upon the various questions of property and trust in issue in this suit, or which is capable of affording to the appellants the due measure of redress. The Society refused, in 1817, to render any account to the City of *London*. That appears from the opinions of counsel before whom they laid cases—which are not produced in the cause—but the opinions were to the effect, that they were trustees for the twelve City companies, and liable to account to them, but that they were not trustees for the Corporation of the City. Whether these opinions were right or wrong, they were founded on the facts comprised in the cases submitted by the Society to

their counsel. In 1828 and in 1830, they refused accounts demanded by the companies. The Master of the Rolls did not, in his judgment, satisfactorily deal with the uninterrupted series of admissions of trust by the Society, from the first institution of that Society down to the year 1828. His Lordship attached no weight at all to the admissions made in the early existence of the Society, and in the struggles with the Crown from 1632 to 1641; and he held that the admissions made subsequently were made by the Society under a mistaken apprehension of their position; but his Lordship did not point out any mistake.

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Sir *Thomas Wilde* and Mr. *Kindersley* (with whom was Mr. *W. P. Wood*) for the respondents :

The important question in this case is—as Lord *Cottenham* stated it on the motion for a receiver (i)—“Whether upon the settlement made in the North of *Ireland* by virtue of the charter of King *James I.*, under which the towns of *Londonderry* and *Coleraine* were founded, and a large tract of country granted by the Crown to the City of *London*, or to the *Irish Society*, or to the twelve companies, the terms of the grant simply constituted the *Irish Society* ordinary trustees for the benefit of the companies; or whether the grant was not coupled with certain public purposes and trusts, independently of the private benefit of the companies?” That is the question raised upon the pleadings in the cause, and now submitted to the decision of this House.

The charter, by which the lands were granted, incorporated the *Irish Society* “for the better ordering, directing, and governing all and all manner of things for and concerning the City and citizens of *Londonderry*, and the county of *Londonderry*, and the Plantation to be made within the said city and county, and other businesses

(i) 1 Myl. & Craig 164.

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belonging to the same." The lands that were so granted were soon afterwards conveyed by the *Irish Society* to the twelve companies of *London*, except the town lands connected with *Londonderry* and *Coleraine*, and they, together with the ferries and fisheries on the rivers *Bann* and *Lough Foyle*, were retained in the possession of the *Irish Society*, as they allege, and as the charter of *Charles II.* recognises, "for defraying the expences of the general management and operation of the Plantation." The Society have been in possession of the reserved property now for about two hundred and twenty years, except the short interruption caused by the arbitrary judgment of the Star Chamber; and this is the first attempt on the part of the companies to interfere with their possession, or with their administration of the rents and profits, which, from being very limited at first, now, in consequence of their management, average 8000*l.* a year.

The case attempted to be made by the appellants for themselves and the other companies is, that in the agreement for the grant of the lands forming the Plantation, entered into between the King and the Corporation of *London*, that corporation, being composed of members of the several companies, represented those companies, and acted only as their agents in the agreement and in the other transactions respecting the Plantation: that the companies

nient management of the property for the companies, and not for any public purpose; that when the lands were divided among the companies, the town lands, ferries, and fisheries not being capable of division, were retained by the Society to be managed by them as agents and trustees for the companies, and that accordingly the Society, in and from the year 1623, paid over the net profits of that property to the twelve companies in equal shares, and never exercised any right or discretion, and never, until very lately, set up any claim of right to apply any part of their rents to public or charitable purposes in the county or City of *Londonderry*, or elsewhere. These are the allegations and charges in the bill, and they constitute the grounds and substance of the arguments for the appellants in the Rolls Court, as well as at this Bar.

The *Irish* Society, on the other hand—claiming no beneficial interest whatever in this property—insist that by the charters the rents and profits are applicable, in the first instance, to the furtherance of the general objects of the Plantation, under their supervision and at their sole discretion, and that the companies have no right to demand a division of any part of them among themselves. The Society deny that the Corporation of *London* represented the companies, or acted as their agents in the transactions with the Crown respecting the Plantation; on the contrary, they allege that the Court of Common Council of *London* on that occasion exercised a sovereign power over the companies; that a Committee of that Court on behalf of the Corporation of *London*, and not of the companies, entered into the articles with King *James*, and undertook the Plantation in furtherance of his Majesty's intentions, as set forth in the "Printed Book;" that, in order to raise the money required for the purpose, the Court of Common Council exercised their power, (which was not then disputed,) of taxing the citizens of *London*, for purposes alleged to be beneficial to the city; that the mode of

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taxation was by precepts addressed by the Lord Mayor to the wardens of the respective companies, commanding them to call their companies together, and to raise given sums proportioned to the whole amount to be raised, according to an assessment called the corn-rate, by which the companies were compellable to furnish a given quantity of corn to the City granaries, and the monies were raised in each company by the poll; that the monies thus raised were applied, at first by the Court of Common Council, and afterwards by a Committee of that Court, (forming the germ of the *Irish* Society,) without any reference to the companies; that subsequently the Court of Common Council proposed to the companies, that they themselves should undertake the planting of all the lands, except the town lands (which, together with the ferries and fisheries, the City of *London* reserved for the general purposes of the Plantation), and should receive grants in severalty of the undertaken lands, and also so much (if any) of the surplus profits of the reserved property as the City, after providing for the general operation of the Plantation, might in their discretion think fit to distribute among them, as a compensation for the monies raised by taxation; that this proposal was ultimately acceded to, and the Court of Common Council then took upon itself to divide, with the before-mentioned reservations, the whole of the property

in mortmain, they were expressly authorised to grant to the companies such part of the lands granted to them "as they should think fit," and in the conveyances which they made to the companies, they reserved to themselves quit rents, timber, and the right of hawking, hunting, fishing, and fowling; that in the year 1623, and subsequently, whenever the profits of the town lands, ferries, and fisheries, and the other reservations were more than sufficient for carrying on the general operation of the Plantation, the Society, following up the original proposal of the Court of Common Council, divided the greater part of the surplus amongst the twelve companies, but except as to such surplus, they deny that they are trustees for the companies, being in the first place trustees for general public purposes, provided for by the charters of *James I.* and of *Charles II.*, including divers public charities, the promotion of the Protestant religion in the Plantation, the protection and defence of the settlement, the advancement of the trade and commerce, and general welfare thereof.

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It is admitted by all parties that King *James* had by this Plantation intended to effect a great public object. Was that object limited to certain definite purposes, which could be accomplished within a given time, or did it embrace the permanent management, government, and prosperity of the district, to which the King's charter applied, by giving to the *Irish* Society power to apply at their discretion the proceeds of parts of the Plantation for promoting those purposes from time to time, as the necessity and opportunity for doing so might arise? It is also admitted that the *Irish* Society was created with the intention that it should be a permanent body, with duties, not of a temporary, but of a permanent nature, to be performed. And although the appellants' bill and their motion in Chancery, proposed to discharge the Society and transfer the property in question from them to other

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trustees, the appellants now admit that the Society's possession cannot be disturbed, nor partition made of the property among the companies. These are important admissions, and inconsistent with the argument that the property is not subject to any public trust.

It has been inferred that because the charters in this case contain no express covenant or declaration of trust, none is created; but if the Crown's object in making a grant be apparent in the charter, though not expressly stated, the acceptance of it creates an obligation on the grantee to perform the object; *Bret v. Cumberland* (j); *The Mayor of Lyme Regis v. Henley* (k). And so the acceptance of the grant of those lands for plantation in the north of *Ireland* was, without any express covenant, subject to the duties of building, and otherwise improving the towns, and promoting the other objects contemplated by the King for the benefit of the country, and which appeared in "the Collection of Orders and Conditions," published by his Majesty's order.

The *Irish* Society have always professed themselves to be trustees, not always legally and aptly expressing the nature of their position, but honestly declaring that they claimed no personal benefit from the property under their management, but that they were bound under the charters which created them to effect the purposes for which the grant was by those charters made to them, and that when

into the consideration of the admissions made by the *Irish* Society and the City of *London*, during the proceedings in the Star Chamber, and afterwards in their application to the King and House of Commons. His Lordship did consider them, but did not deem them entitled to any weight under the circumstances. Admissions of trust made by the *Irish* Society in past times, under different circumstances and when differently constituted, cannot be held to bind the present Society, nor are they to be affected by any admissions of the Corporation of *London*: they are distinct bodies. Admissions by individuals in a private capacity are properly held to estop them, but that rule does not affect public bodies in the discharge of public duties. Why should admissions of the *Irish* Society, formerly or now, affect or diminish the rights or interest of the people settled on the Plantation in *Ulster*, in the preservation of the funds intended for their benefit? Why should the Society be held to admit away the duties, which upon their creation the Crown imposed on them, or the right of the Attorney General to call on them to effect the objects of the charter?

It was the King's original intention to grant the escheated lands in *Ulster* to the Corporation of the City of *London*; but the Common Council having found it convenient to continue the Committee of its own members, consisting of a Governor, Deputy, and twenty-four assistants, for discharging the duties connected with the proposed grant, also judged it convenient to have the grant made by the King to that Committee, and to have them created a permanent body, for the purpose of effecting all the purposes of the grant. But still the Society was a distinct body from the Corporation of *London*, in respect of the performance of the duties imposed by the charter, and was wholly independent of the City Companies.

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It has been urged frequently in the course of the argument for the appellants, that the money raised in the City, for the purposes of the Plantation, was contributed by the companies, and that they were voluntary undertakers; that in fact they were purchasers. But they did not contribute one shilling from their corporate funds, indeed, they declined altogether to undertake the Plantation; the money was all contributed by individual members, being raised by a tax on the poll, under the compulsory power of the city, without giving a voice even in the matter to the companies, who were mere instruments for raising the money, under precepts issued to them from the City authorities. The companies were referred to as the machinery for raising the money from the individuals. The "viewers" suggested in their report that for raising the money, the fittest course was "by way of companies, and in companies by the poll, according to the rate of corn set on every company; but some of the inferior companies were thought fit to be spared, yet such as were known to be able men in those companies, to be set proportionably with men of like ability on other companies." In that manner the 130,000*l.* expended on the Plantation, were raised, under the compulsory authority of the Common Council. The companies were not known to the Crown in the matter, until the licences to hold in mortmain were applied for. And yet, although the money

certain number of houses in *Londonderry* and *Coleraine*, and that 4000 acres and 3000 acres of lands adjacent to these towns should be laid to them respectively, it was stipulated that "the rest of the territory, estimated at 12,000 acres (a mistake for 20,000) more or less, to be undertaken by the city, should be cleared of all particular interests." In the articles, therefore, a clear distinction is made between the town lands (the 7000 acres), and "the rest of the territory to be undertaken." A like distinction is pointed at in "the Motives and Reasons" previously addressed to the city. It is obvious that it was not intended that the 7000 acres were to be granted out to undertakers, but were destined for other purposes, which are indicated in that part of the charter, which authorised the *Irish Society* to hold courts for conducting the business of the Plantation. The tenures also were different, the towns and town lands (the 7000 acres) having been granted to be held "in free burgage," and "the rest in free and common socage." There were certain permanent objects to be carried into effect, essential to the prosperity of the undertaking, and the town lands were destined to supply funds for these objects, such as building town-halls, bridges, churches, and schools, where they should be required, and these would be purposes beneficial to the whole of the undertakers in different degrees, without any participation in the funds, unless a surplus remained after the general objects had been carried into effect.

It was argued for the appellants, that the town lands, ferries, and fisheries, remained in the possession of the *Irish Society*, because they could not be easily divided among the companies. That was the construction put on the words in the report of the commissioners, that a division "could not *fitly* be made of them;" but the words of recital in the charter of *Charles*, now the operative charter, were, "could not *properly* be made." The words, whether "*fitly*" or "*properly*," did not imply any

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physical difficulty in dividing the lands at least; but the true construction is that they were never intended to be divided among the companies. They were reserved to the *Irish* Society, for defraying the expences of the general operations of the Plantation. The Society were for that purpose created public officers, with public duties, accountable to the Crown for the proper discharge of those duties, and not at all responsible as agents, or trustees, to the companies. Those duties so imposed on the Society are of so general and indefinite a nature, that no Court could enforce the performance of them, the Society being expressly authorized in the words of the charter of *Charles*, "to order and direct all and singular things, which, for or concerning the Plantation, supply, establishment, *continuation*, and government of the said city (*Londonderry*), and of all the lands and tenements in these presents mentioned to be granted, shall seem to be most profitable and expedient."

There has been a uniform course of dealing with this property for more than two hundred years, on the supposition that it was held by the Society, subject primarily, after payment of certain annuities and the expences of management, to a trust for permanent public purposes beneficial to the whole of the inhabitants of the Plantation, and the general improvement of the county of *Londonderry*. The Society have always exercised an absolute

over part of the surplus rents from time to time to the twelve companies in round sums ; and no company up to the time of filing the present bill, questioned the exercise of their discretion. It is not of any importance to the great question or merits of the cause, to offer any argument, or enter into any detail or justification of the alleged extravagant expenditure pointed out by the appellants in the accounts. It is with confidence submitted that this House will come to the same conclusion as the Master of the Rolls did, viz., that the *Irish Society* are not trustees, in the ordinary sense, for the companies of *London* ; that the grant of this property was coupled with certain public purposes and public trusts, independently of the private benefit of the companies ; and that these public purposes are entirely in the discretion of the Society, subject of course to be restrained by the officers of the Crown.

Sir *Charles Wetherell* (with whom were Mr. *Law*, the recorder, and Mr. *Randell*) was heard for the respondents, the Corporation of the City of *London*. He urged statements and arguments similar to those that were before urged on behalf of the *Irish Society* by their counsel. He next proceeded to show that the City of *London* stood in a character, as to the property in question, in many respects distinct from the *Irish Society* ; the City being, in its corporate capacity, invested under the charters of *James* and *Charles* with a peculiar jurisdiction as supreme governors and visitors of the Plantation, for the general benefits of the Plantation. The conduct and proceedings of the *Irish Society*, who were, by the royal charters, made the managers and directors of the Plantation, are thereby subject to be visited, corrected, and regulated by the Corporation of *London*, whenever occasion required their interference. The appellants' complaint, if well founded, would be a subject for that visitatorial jurisdiction ; and not for a bill in a Court of

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But supposing a Court of Equity to be the proper Tribunal to resort to in this case, he submitted that the suit was defective for want of parties, inasmuch as all the inhabitants of the county and city of Londonderry were interested in the application of the funds.

Mr. Twiss (with whom was Mr. Wray) was heard on behalf of the respondent, the Attorney General. He also maintained the claims asserted by the Irish Society, and submitted that the Court of Chancery had no jurisdiction to grant such relief against the Crown, or the Attorney General representing the Crown, or against the other respondents, as was prayed by the appellants' bills. He also objected to the frame of the suit, which consisted of a bill and supplemental bill, and to the latter only was the Attorney General made defendant.

The *Solicitor General* replied.

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The *Lord Chancellor*.—It is not necessary in this case that I should enter into a detailed statement of all the facts referred to in the printed cases, which were laid up

(l) 2 Ves., Sen. 327.

(m) 2 Ves., Jun. 42.

(n) Duke's Ch. Uses, c. 6.

(o) 2 P. Wm. 326.

(p) 13 Ves. 519.

(q) 4 T. Rep. 233.

(r) 17 Ves. 498.

(s) 2 Ves. & B. 134.

your Lordships' table; because they are sufficiently set forth in Mr. *Beavan's* report of the judgment of the Master of the Rolls. I shall confine myself, therefore, merely to stating such facts and circumstances as appear to me to be necessary for the purpose of explaining the opinion which I have formed upon the case.

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It appears that in the early part of the reign of King *James* the First, in consequence of the attainders occasioned by the then recent rebellion, a very large tract of country, consisting of several counties in the north of *Ireland*, became vested in the Crown. The King was desirous of settling those lands with his *British* and *Scottish* subjects, and establishing the Protestant religion in that district. For that purpose he proposed assigning grants of lands to persons who were willing to accept them, on certain terms and conditions. Those terms and conditions are fully set forth and explained in a book, which has been known in the course of these discussions by the name of "the Printed Book." Great detail is there entered into as to what was expected to be done by the settlers with respect to the houses they were to build, the nature of their erections, the tenants that they were to establish, churches that were to be built, the fortifications that were to be constructed, and other objects with reference to the settlements.

It occurred to the King that it would be extremely desirable to engage the City of *London* in this undertaking, on account of the influence and wealth of that corporation; and negotiations for that purpose were opened between the Privy Council and the Corporation of *London*. Those negotiations were carried on for a considerable period of time, and at last terminated in certain articles of agreement. By those articles of agreement, it was stipulated, on the part of the Crown, that the city of *Derry*, or the site of the city of *Derry*, with 4000 acres of

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land contiguous to it, the town of *Coleraine* with 3000 acres of land contiguous to that town, and an intervening district between the river of *Derry* (*Lough Foyle*) and the river *Bann*, containing about 20,000 acres, should be conveyed by charter to the Corporation of *London*. They were also in addition to have certain fishings—the fishings of *Lough Foyle* near the city of *Derry*, and the fishings of the river *Bann*. They were also to have Admiralty rights along the whole range of the coast, with certain other privileges of customs for a period of ninety-nine years, and other advantages on their side. It was stipulated that they should, within a certain time, build 200 houses in the city of *Derry*, and 100 houses in the town of *Coleraine*; that they should ultimately build 300 houses more in the city of *Derry*, and 200 more in the town of *Coleraine*; that they should construct certain fortifications; that they should provide a garrison for the fortress of *Culmore*; that they should advance 20,000*l.* to be expended on this undertaking. This was the substance of the agreement that was entered into between the Privy Council, on the part of the Crown, and the City of *London*.

Immediately after the completion of this arrangement, it occurred to the City of *London*, that it would be proper

levied, the 20,000*l.* that were stipulated to be raised for purposes of the Plantation. It had been usual at that time, and it was assumed apparently as a right incident to the Corporation of *London*, to raise money from the companies. The whole sum was distributed among the companies, divided between them in certain proportions; and the companies were to raise from the individuals by poll the proportions for each.

In this manner the 20,000*l.* were raised; and that sum not being sufficient for the purposes that were intended, a further sum of 10,000*l.* appears to have been afterwards raised in the same manner. A proposal was made by the Corporation,—by the Common Council, the governing body of the Corporation—to the companies, to undertake the plantation, that is, to undertake the plantation of the whole of the territory which formed the county of *Londonderry* situate between the river of *Lough Foyle* and the river *Bann*; and it was proposed that that territory should be allotted to them in the proportions of their respective advances. They were at the same time informed that whether they accepted that offer or not, they would be liable for the charges of the fortifications, buildings, and other matters that were to be performed with respect to this Plantation; and that on the other hand they would be entitled, if they accepted this offer, to have their share and proportion of the produce of the reserved part, namely, the town lands, and fishings, and ferries. It appears that this proposition was acceded to by the greater part of the companies; two ultimately declined, and the rights of those two became vested in the Corporation of *London*.

This was the state of things previous to the grant of the charter. In the year 1613, the charter was granted by King *James* the First. By that charter the company which had been established for the purpose of superin-

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tending, directing, and managing this property, were converted into a corporation ; they were created a corporation by the style set forth in the charter, and, as they are usually styled, “ the *Irish Society*.” That was the first part of the charter. The charter then went on to convey the whole of the property in question to the *Irish Society*, and to fulfil, with some variations which had been previously agreed to, the stipulations contained in those articles to which we have referred.

In consequence of this, after the charter was granted, an application was made, on the part of the different companies, for licenses to hold in mortmain ; and after these licenses had been granted, the *Irish Society* conveyed, in severalty, to the different companies their proportions, agreeably to the undertaking into which they had previously entered, and from that time to the present the respective companies have held those lands in severalty as their own ; and the *Irish Society*, from that period to the present, have held the town lands, both of the city of *Derry* and of the town of *Coleraine*, the ferries, and the fishings, by an absolute title, letting the property, receiving the rents, and employing them entirely, according to their own discretion. That is the actual state of things, and was the actual state of things at the period to which I have referred.

Resolutions were moved, and were adopted, and it was decided that those measures were illegal.

Application was made to the Crown; and *Charles* the First promised to restore the charter. However, before he had an opportunity of doing this, the troubles ensued, and it does not appear very distinctly what afterwards took place, until the restoration of *Charles* the Second.

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After the restoration of *Charles* the Second, I think in the year 1662, a new charter was granted. That charter recited the promise of *Charles* the First to restore the charter; and it went on to say that the intention was to replace the parties in their former position, precisely in the same way as if the charter had not been repealed. Then it went on to convey those lands again to the *Irish* Society, to incorporate the *Irish* Society, and to carry out the stipulations and conditions of the former charter, as far as they were applicable, in consequence of the lapse of time which had occurred since the grant of the former charter.

From that period, as I have before stated, the *Irish* Society have held the possession of the lands and property in question; the different companies have held their lands in severalty; the *Irish* Society have applied the funds for public purposes, connected with the Plantation, and connected with the affairs of the Society. They have applied them for purposes of religion, partly in the building or repairing of churches, of chapels, of public schools, the paying of school-masters, building bridges, fortifications, and a variety of other public objects; and after they have satisfied those public objects, apparently according to their own discretion, they have paid over the surplus generally in round sums to the different companies, according to the proportions of their original contributions.

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Now the question is this,—Under these circumstances, in what situation do the *Irish* Society stand? Are they trustees for these companies, for the private interest and advantage and benefit of these companies? Or are they trustees for public objects? If they are trustees for public objects and public purposes, it is quite clear that this suit cannot be maintained; and the sole question therefore, as a general question, is to determine, from all the circumstances arising out of these transactions, in what character they stand. If they are mere trustees for the private benefit of the companies, for their private advantage, then the suit is properly instituted. If, on the other hand, they are trustees for public objects; if they are (if I may so say) public officers, who have important public duties to perform; and if those funds which they hold are applicable to the discharge of those public duties; if they have a discretion as to the extent and manner in which they shall apply them, in that case it is quite clear that this suit cannot be maintained in the shape in which it is instituted, at the instance of these companies, or of this company—the Skinners' Company.

For the purpose of deciding this question—an important question—it is material to consider what was the object of this Plantation, and what was the object of this

It was a great public object, it was for the

Arthur Chichester by the King in council, or, I believe, by the King himself personally, those are stated to be the objects of this establishment; they are emphatically stated to be the objects in the preamble to the charter to which I have referred.

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It will be material, in order satisfactorily to shew what were the objects which the King had in view, in making this grant and establishing this corporation, to refer to the preamble of the charter. It runs in these words:—

“Whereas there can be nothing more kingly than to establish the true religion of Christ among men, hitherto depraved and almost lost in superstition; to strengthen, improve, and cultivate, by art and industry, countries and lands uncultivated, and almost desert; and the same not only to plant with honest citizens and inhabitants, but also to renovate and strengthen them with good statutes and ordinances whereby they might be more safely defended, not only from the corruption of their morals, but from their intestine and domestic plots and conspiracies, and also from foreign violence.” It then goes on thus:—
“And whereas the province of *Ulster* in our realm of *Ireland*, for many years now past, has grossly erred from the true religion of Christ and divine grace, and hath abounded with superstition, insomuch that for a long time it hath not only been harassed, torn, and wasted by private and domestic broils, but also by foreign arms, we, deeply and heartily commiserating the wretched state of the said province, have esteemed it to be a work worthy of a Christian prince, and of our royal functions, to stir up and recall the same province from superstition, rebellion, calamity, and poverty, which heretofore have horribly raged therein, to religion, obedience, strength, and prosperity.” Those are the words of the preamble of the charter: those are the objects for which the grant was made, and for which this establishment was formed:

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Nobody reading them, and referring also to the other documents which are printed in the volume on your Lordships' table, can doubt for a moment that the objects were public objects of the greatest possible importance.

That being so, the next question is what were the powers conferred upon the *Irish Society*, and what were the duties they had to perform? They had to superintend, order, direct, and manage the whole of this extensive concern: they were appointed for that object: they had to superintend, and govern, and perform, therefore, those duties that were necessary for the purpose of giving effect to the grant, the purposes of the grant being those which I have stated. What, then, were the powers with which they were invested for that purpose? And what were the duties by the charter which they had to perform? "For the better ordering, directing, and governing all and all manner of things for and concerning the city and citizens of *Londonderry* aforesaid, and the aforesaid county of *Londonderry*, and the Plantation to be made within the same city and county of *Londonderry*, and other businesses belonging to the same, we will and grant," &c., "that for ever hereafter there shall be twenty-six honest and discreet citizens of our city," and so on. It is for those purposes that the *Irish Society* was formed, and having formed the Society, it goes on thus: it gives them power to hold a court, "and in the same court and meeting to do, hear, transact, and determine all and all manner of matters and things whatsoever of, for, or concerning the Plantation or government aforesaid, as to them shall seem best and most expedient; and also in the same court or meeting shall and may have full power and authority to direct, constitute, and ordain for and on the part of the Mayor, and Commonalty, and Citizens of our City of *London*, in our kingdom of *England*, all and singular, things which for or concerning the Plantation, supply or establishment, constitution and government of

the aforesaid city of *Londonderry*, and of all other the lands and tenements hereunder in these presents mentioned to be granted, shall seem to be most profitable and expedient; and also to send orders and directions from this kingdom of *England* into the said realm of *Ireland*, by letters or otherwise, for the ordering, directing, and disposing of all and all manner of matters and things whatsoever, of or concerning the same Plantation, or the disposition thereof, and also for the receipt, ordering, disposing, and laying out of all sums of money, now collected and received, or hereafter to be collected and received, and generally any other cause, matter, or thing whatsoever, concerning the direction or ordering of the Plantation aforesaid, or concerning any other things whatsoever, which, by the true intent of these our letters patent, can or ought to be done by them for the better government and rule of the city of *Londonderry* aforesaid, and the county of *Londonderry* aforesaid."

These, then, are the very extensive and large powers that are given to this Society for the purpose of carrying into effect the intentions of the Crown, the intentions of the Crown being these great and important public objects to which I have already called your Lordships' attention.

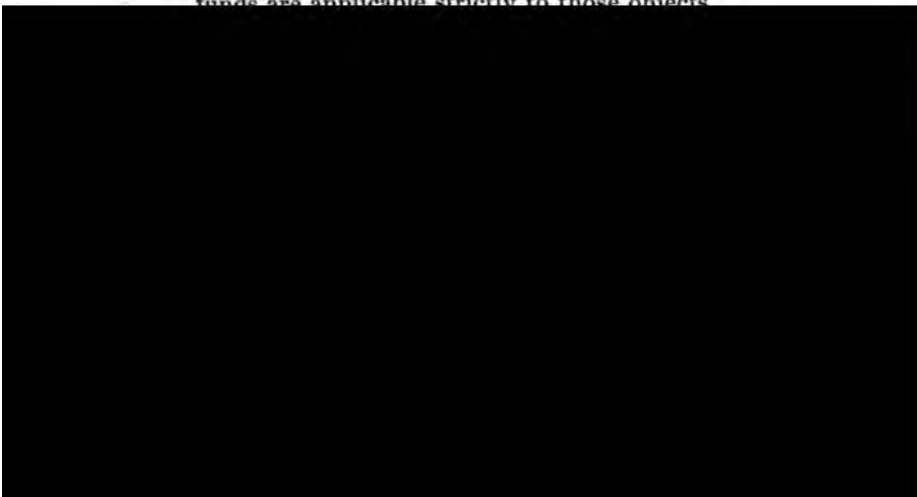
My Lords, another question which has been raised in the course of this discussion, was this; it is suggested that those duties were performed and completed within a short period after the grant of the charter, and that those trusts are already entirely at an end—that they have expired. It is quite impossible, as it appears to me, to maintain such a position. In the first place, so far as relates to the city of *Londonderry*, they, the *Irish* Society, have a constant superintendence and control over that corporation, for their consent is necessary to any bye-laws that may be published at any time, and enacted by the corporation; they have to provide for the Protec-

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tant religion, the Protestant establishment in that district ; that is not a temporary but a permanent object ; and with the establishment of religion in that district, they have also to superintend and take care of that which is closely and intimately connected with religion, and a part of it, if I may so describe it, namely, the education of the inhabitants of the district ; they have also to perform other public duties of great importance connected with the district ; duties, as it appears to me, from the very nature and character of them, of a permanent description ; and it appears to me that there is no foundation whatever for the argument which has been urged, that their authority as public officers has long since expired, and they have no public duties at present to discharge.

The next question is, whether these funds are applicable to those objects ? With respect to that, no doubt can be entertained ; the *Irish* Society were established for the purpose of effecting and superintending those important objects ; expense must of necessity have been incurred for those purposes ; they had no other funds but the funds arising out of this grant ; the grant was given on the condition of those duties being performed, and nobody therefore, reflecting at all on the nature of these transactions, can doubt for a moment that those funds are applicable strictly to those objects.



sider meet and expedient; they have a discretion, therefore, directly vested in them; but it is unnecessary to refer to the words of the charter for that purpose; the very duties they have to perform import discretion. If they have authority to superintend and govern—and they were established for that purpose—if they have authority to superintend and govern, and make laws and ordinances for the purpose of superintending and governing this district, of course they must have a discretion as to what subject it shall be applied to, and in what manner that power shall be exercised.

The result of all these observations is this, that the objects are public and important; that they (the *Irish Society*) are constituted for the purpose of carrying those objects into effect; that those objects are still in existence; that the funds of this district are applicable to those purposes; that they have a discretion to exercise as to what extent they will apply those funds, and to what object; if that be so, they are public officers, invested with a public trust, having a right to apply those funds in discharge of that public trust, and they, therefore, cannot be accountable in a suit of this kind by the Companies of *London*, or by any particular company, as if they were trustees for private objects and private purposes.

But the case does not rest there, because, as far as relates to this particular portion of property, the town lands, the fisheries, and the ferries; it is declared expressly in the charter of King *Charles* the Second, that those funds are applicable to the general operations of the Plantation. It is stated in the preamble of that charter that they were retained for that purpose, and when the Crown states that they were retained for that purpose, it sanctions the application; and when it re-grants the pro-

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perty, it re-grants it subject to that condition, and authorizes and directs the application to those objects.

Again, with respect to the permanence of those objects: when it is said that those objects were in a few years accomplished, and that those public trusts ceased, we must look at the charter of *Charles* the Second as giving at once a denial to that allegation. That charter was published fifty years after the charter of *James* the First. In that charter it is stated that the object of the incorporation at that time, in the year 1662, is for the further and better settling and planting of the said country, towns, and places with trade and inhabitants; so that not only from general reasoning, arising out of the nature of their duty from their constitution, but from the very terms of the charter, it appears that the idea that this was a mere transitory duty, is wholly unfounded; and it appears that at that time there was still much of the same duty remaining to be performed as was required to be performed at the time when the original charter was granted.

Now, my Lords, if that be so, the conclusion I come to appears to me to be irresistible; they are public officers; they have public duties to perform of an important kind. By the terms of the charter of *Charles* the Second, independently of any general reasoning, this property is

public duties; and after they have satisfied those duties—after they have applied to public objects what in their judgment, in the fair exercise of that judgment, is necessary for those objects—then it is, and then only, that the surplus which remains subject to their discretion, has been usually paid over to the companies. It is perfectly clear, therefore, in this state of things, that they cannot be considered as trustees for the private benefit of the companies. If they are public officers, and have in any respect neglected their duty, they are liable to account; but they are not liable to account to the companies. They may be liable to account to the Crown; they may be liable to account for misconduct to the Corporation of the City of *London*; they are elected by the City of *London*; they are half of them removed every year. The City of *London* can exercise a control over them if they misconduct themselves; they can be restrained and kept in order by the authority of the City of *London*, or by the authority of the Crown, if they are public officers; but they are in no respect, as it appears to me, amenable to the private companies for the manner in which they perform their duties.

I am of opinion, therefore, that this suit cannot be maintained. I may state that this is in conformity, not merely with the opinion expressed by Lord *Langdale* in the judgment which he has delivered, but that it arises out of what was intimated by Lord *Cottenham* on a former occasion, on an interlocutory application made in the course of this suit; and I have the authority of that noble and learned Lord to state, that he retains the opinion which he then formed, imperfectly formed at that time, because the case was not fully before him; but after hearing this case, he has been confirmed in the opinion he then entertained.

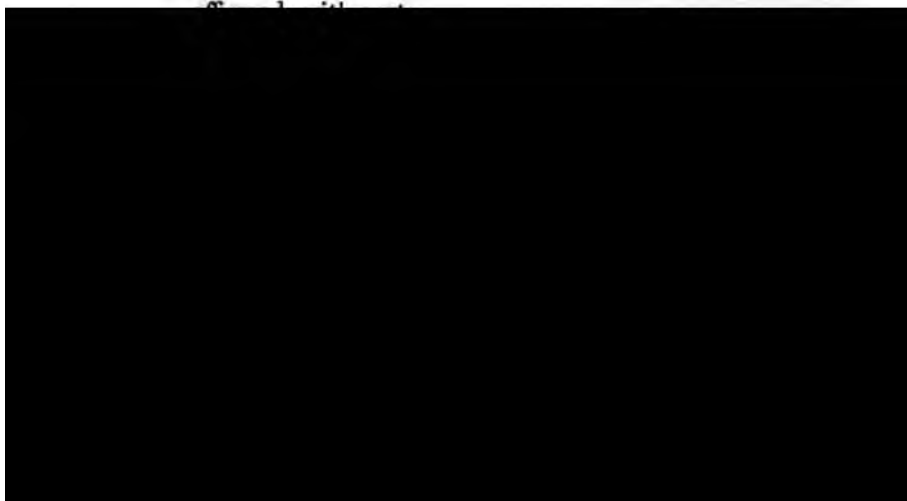
I, therefore, move your Lordships that this judgment be affirmed.

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Lord Campbell.—Entirely concurring in the view of the case which has been taken by my noble and learned friend, I have hardly a word to add to his most lucid explanation of the case, and it is on account of the magnitude, rather than the difficulty of the case, that we have taken some time to consider it before we should intimate the opinion which we had formed upon it. The moment that it came before *Lord Cottenham*, he, with his usual precision, seized the question, and at once stated it to be, whether the *Irish* Society are to be considered as merely private trustees, or as trustees for public purposes. He then gave his opinion that they were trustees for public purposes. When the case came before *Lord Langdale*, he, after great deliberation, came to the same conclusion. I concur in the opinion that those eminent Judges have pronounced. It seems to me that the object of the Crown was, that public purposes should be attained by the trustees who had the management of these lands; and I am clearly of opinion, that the purposes for which the grant was made, still continue, and that they are and must ever remain trustees for those public purposes. It is, therefore, quite clear that this suit cannot be supported, and that it was properly dismissed.

The judgment of the Master of the Rolls was then



WILLIAM WALLACE	-	-	<i>Appellant.</i>	1846.
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K., holding lands under the see of D. for a renewable term of twenty-one years, demised them, in 1787, to two persons for a like term, with a *toties quoties* covenant for renewal. These sold their interest in part of the lands, and divided the rest equally among them. On the death of one, his share passed to his two sons, A. and A. Lowry; the share of the other was sold to P. The two Lowrys obtained a renewal of the lease of all the lands to themselves in 1822, without the P.'s knowledge, and then mortgaged them to M., and obtained a judgment in ejectment against P., who thereupon filed a bill against them and M., and obtained, in 1826, a decree for an account and reconveyance of his part, on payment of his proportion of the renewal fines and costs. W., who had been the attorney of the Lowrys in all these matters, obtained an assignment of their interest in 1829. P. did not make up the decree of 1826, but he made several payments to W. in respect of the renewal fines and costs, and urged him to reconvey to him his part of the lands, and grant a renewal; but being in distress, he signed an agreement to surrender his lands to W., and take part of them as his tenant:—

Renewals of Leases. Fraud. Practice. Costs.

Held, upon a bill filed by P. in 1842, that he was entitled to the benefits of the decree of 1826 against W.; that the accounts thereby directed ought to be then taken; that the agreement signed by P. to surrender was without consideration, and void, and that he was entitled to the value of his lands while they were in the possession of W., and to a reconveyance and renewal upon payment of the balance found due from him.

A defendant who, by a mistake in practice, allows an account to be taken against him without objection, is not entitled, being himself a solicitor, to have the accounts re-opened.

When a decree is varied by the House, only on a point which was not raised in the Court below, nor made a ground of appeal, the appellant must pay the costs of the appeal.

THIS was an appeal from a decree of the Court of Equity in the Exchequer in *Ireland*, upon the following state of facts :

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John Knox being, in the year 1783, possessed of the lands of *Lisbane*, containing about fifty acres, held by him under the see of *Down* and *Connor* by a lease for twenty-one years, demised the said lands to *Andrew Lowry* and *Alexander Lowry*, their executors, administrators, and assigns, for a term of twenty-one years, from the 1st of *May*, 1783, with a covenant for renewal when and so often as the lease from the see of *Down* and *Connor* should be renewed to *J. Knox*, his executors, administrators, or assigns, at the annual rent of 1s. 8d. per acre, and 6d. in the pound as receiver's fees, and subject to the payment of one year's rent, as a fine on each renewal, provided *J. Knox* should pay no more to the Bishop of *Down* and *Connor* for any future renewal he might obtain of his then lease. *Andrew* and *Alexander Lowry*, after being some time in possession of the whole of the lands, disposed of their interest in eighteen acres thereof, retaining to themselves the remaining thirty-two acres, of which they made equal partition. Some years afterwards *Andrew Lowry* died, having by his will bequeathed his sixteen acres to his sons *Andrew Lowry* and *Alexander Lowry* the younger, as tenants in common. *Alexander Lowry* the elder, remained in possession of his sixteen acres until the year 1819, when his interest therein was sold under a writ of *fi. fa.* to *Thomas Patton*, the

when *Joseph Murphy*, who was appointed receiver of *W. H. Knox's* estates, in a creditors' suit against him, entitled *Scott v. Knox*, by order of Court in that cause, applied for and obtained a renewal from the then bishop of the said see. The receiver not being aware of the changes which had taken place in the ownership of the interest in the lease of 1783, and finding the names of *Andrew Lowry* and *Alexander Lowry* in the counterpart thereof, addressed a letter to them requiring them to come in and take a renewal of their lease. *Andrew* and *Alexander Lowry*, the younger, waited on the receiver, and having represented themselves as the parties entitled to the whole of the lands demised by the lease of 1783, and having paid the renewal fines then due for the entire farm, obtained a new lease of the whole to themselves, their executors, administrators, and assigns, dated the 19th of *October*, 1822. On the same day that they obtained the renewal, they executed a mortgage upon the whole of the lands to one *James Murray*, which mortgage was prepared by *John Wallace*, the appellant, as the solicitor and agent of both parties; and he had also acted as the solicitor and agent for the *Lowrys* in procuring the renewal from the receiver.

Thomas Patton, having ascertained that a renewal of *Knox's* lease had been obtained from the Bishop, applied to the receiver for a lease, by way of renewal to him, of his sixteen acres, when he was informed that a renewal had been granted of the whole farm to the *Lowrys*. He thereupon required them to make the renewal to him, offering to pay his proportion of the renewal fines and other charges, and to convey to him his sixteen acres, which they refused to do, and immediately afterwards they had an ejectment on the title served on him by the appellant, as their attorney; the demises being laid in the names of the *Lowrys*, the younger, and also of *Murray*. The respondent took defence to the ejectment, and in

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January, 1823, served a notice on the lessors of the plaintiff therein, whereby he offered to pay his proportion of the renewal fines, and other charges and expenses properly incurred; required a conveyance of his sixteen acres to be executed to him, discharged from *Murray's* mortgage; and gave notice that, in case his requisition should not be complied with, a bill in Equity would forthwith be filed against them. They, notwithstanding, proceeded with the ejectment, and obtained judgment, under which they were put into possession of the respondent's part of the lands.

In *November 1823*, the respondent filed his bill on the Equity side of the Court of Exchequer in *Ireland* against the *Lowrys*, the younger, and *Murray*, and thereby prayed that the renewal obtained by the *Lowrys* from the receiver might be declared to be in trust for the respondent so far as related to his part of the lands, and that the defendants might convey the same to him discharged of the said mortgage, and he prayed the necessary directions consequent thereupon.

The defendants having put in their answers, and issue having been joined, witnesses were examined on both sides.

The cause was heard in *June 1826*, when the Court pronounced a decree, whereby it was referred to the

Remembrancers to take an account of, and to ascertain the

respondent's part of the said lands whilst they were in possession of them: and it was decreed that they and *Murray* should have their costs of the cause against the respondent, and that such sum as should be reported due by the *Lowrys* should be set off against the costs thereby ordered to be paid to them.

Shortly after that decree was pronounced, the *Lowrys* gave notice to the respondent that they had received notice from the receiver, in the cause of *Scott v. Knox*, to renew their lease of the lands of *Lisbane*, and pay a renewal fine of 57*l.* 13*s.* 9*d.*; and they therefore required the respondent to pay his proportion thereof to the said receiver, or to themselves or their attorney, the appellant. The respondent, upon receipt of the notice, paid the appellant, as attorney of the *Lowrys*, the sum of 18*l.* 2*s.*, as his proportion of the said fine.

The decree of *June* 1826, was not made up by the respondent, nor the inquiries thereby directed prosecuted; but the appellant undertook, as the respondent alleged, to furnish him with an account of his proportion of the renewal fines, interest, and costs, payable under the decree of 1826, and to allow him credit for the value of his part of the lands, whilst they were in the possession of the *Lowrys*, and to execute or procure the execution of the lease directed by the said decree to be made to the respondent: and on the faith of that arrangement, the respondent, in *December* 1826, paid the appellant 100*l.* in cash, and 250*l.* in bills of exchange (afterwards duly paid) on account of the respondent's proportions of the renewal fines, interest, and costs; and the appellant thereupon proposed to allow in account 102*l.* for the rents of the respondent's lands, whilst the *Lowrys* were in possession of them. No accounts were furnished to the respondent, nor was any lease executed to him, although he paid the appellant or his clerk 3*l.* for the stamp for a lease.


The interest of the *Lowrys*, and of *Murray* in the lands of *Lisbane*, was assigned to the appellant, in the year

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1829; and he received from the respondent yearly, down to 1834, 1*l.* 4*s.* for the head rent, to which the respondent's part of the lands was liable; but from 1834, he refused to receive such rent; but claiming to have a right to 30*s.* an acre, under a contract with the respondent, he brought an action of ejectment against him. The respondent being in embarrassed circumstances, consented to judgment in that action, with stay of execution till the 22d of *April*, 1839.

On the 23d of *April* 1839, the respondent filed his bill in the Equity Exchequer against the appellant, and thereby—after stating the matters above stated, and setting forth three notices, dated respectively the 28th of *October* 1835, the 29th of *September* 1837, and the 12th of *October* 1838, which the respondent had served on the appellant, calling on him to execute a renewal lease of the lands to him, and offering to pay all the head rents that were due, and all the renewal fines, interest and costs that should appear due from him, on a settlement of accounts—he prayed that he might have the benefit of the former suit and proceedings against the appellant, and might have the same relief against him as had been decreed against the *Lowrys*, the younger, and *Murray*, and that he might, if necessary, be at liberty to prosecute the accounts directed by the decree of *June* 1826, so far as might be necessary



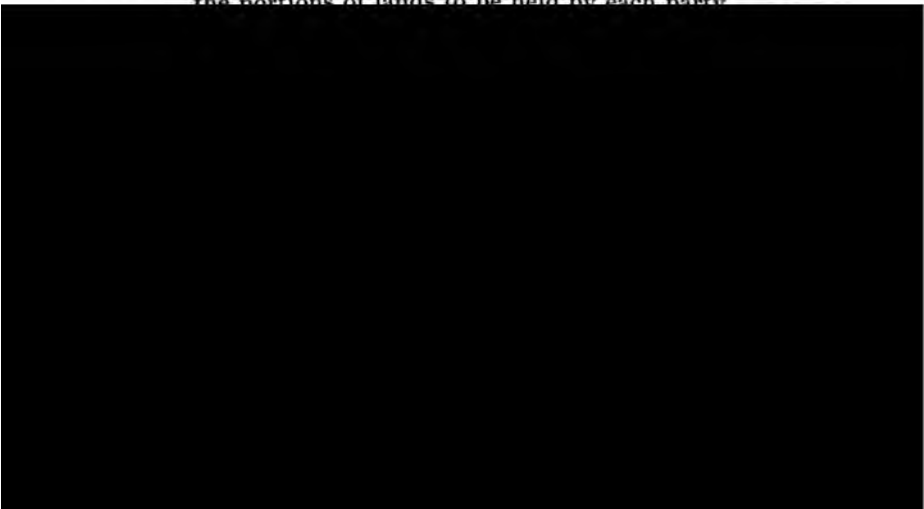
several sums of money paid to the appellant by the respondent on account of the renewal fines, interest, and costs ; and that on payment of such balance, if any, as might so appear to be due by the respondent, the appellant might be decreed to execute to him a proper deed of conveyance of his portion of the said lands, and that the appellant might, in the meantime, be restrained from executing a *habere* in the action of ejectment against the respondent.

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The appellant, by his answer to the bill, said it was not true that the arrangement stated therein took place between him and the respondent, respecting the prosecution of the said first suit, or the settlement of the accounts directed to be taken by the said decree, or the execution of a conveyance to the respondent, pursuant thereto, or that the appellant made any such representations, or promises, as mentioned in the bill, and that the appellant verily believed the respondent had no intention of making up the said decree, or of proceeding to take the accounts thereunder ; and the appellant stated various notices that were served on the respondent and his solicitor to proceed with the said decree ; and that, notwithstanding, he did not take any steps to make it up, but on the contrary, the defendants in the cause were compelled to make up the same for the purpose of enabling them to proceed to recover their costs in the cause, and that the sums which were paid by the respondent in *December* 1826, were paid to the *Lowrys* to prevent them taking proceedings for the said costs, and the appellant positively stated that the said payments were made on account of the costs of the cause decreed to the defendants therein, and were not made on account of the proportion of renewal fines or head-rents payable by the respondent ; and the appellant believed, that the amount of the said payments was considerably below the sum to which the appellant and his clients in the said cause were under that

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decree entitled for costs, and that at the time of such payment, and for nearly three years afterwards, the appellant had not any interest in the said lands, he not having become the purchaser thereof from the *Lowrys* until *November* 1829, and it was wholly untrue that the appellant agreed to allow the respondent 10*l.* for mesne rates, or made any agreement with him on the subject. And he believed that the sum remaining due from the respondent under the decree of *June* 1826, and subsequent renewals, exceeded by far the value of the interest which he claimed in the lands; and he said that he refused to receive the rents that were offered to him in 1834, or subsequently, because they were insufficient, inasmuch as the respondent, in *January* 1834, of his own accord proposed to the appellant to become his tenant at a rent of 30*s.* by the acre, and to give up all claim which he might have to a renewal under the said decree: and he accordingly surrendered all his interest in the said lands to the appellant, and agreed to become his tenant thereof, and to take another portion of the lands, in lieu of the portion then held by him, as certain arbitrators should award, and to hold the same as tenant to the appellant under a certain yearly rent, and that the arbitrators appointed on behalf of the appellant and respondent met, after notice to the respondent, and made their award, thereby allotting the portions of lands to be held by each party.



adduced on both sides are contained in the remembrancer's report (*infra*, p. 500).

The cause was heard in *January* 1842(a), when the Court decreed that the respondent was entitled to the benefit of the decree of *June* 1826, against the appellant, and to have the accounts directed by that decree then taken. And accordingly it was referred to the Remembrancer to take an account and ascertain the porportion of the renewal fines, interest, and costs payable by the respondent for his part of the said lands ; to tax and ascertain the costs due, and theretofore incurred by the respondent under and by virtue of the said decree; to take an account of what the *Lowrys*, the younger, made, or without wilful default might have made of the respondent's lands while they were in possession thereof, and a like account of what the appellant made or might have made of the said lands since he came into possession of them ; to take an account of all sums paid by the respondent on foot of the former decree : And it was decreed that the respondent was entitled to his costs in this cause against the appellant, except the costs of the accounts before directed, as to which the parties were to bear their own costs respectively, and that such costs to which the respondent was by the present decree declared to be entitled, together with the sum which should be found due to him on foot of the last mentioned accounts, respecting the possession of his portion of the said lands, and also the sums paid by him on foot of the former decree, should be set off and allowed against the sum to be found due by him on foot of the accounts last before directed ; and it was ordered that the Remembrancer should strike a balance, and the same should be paid by the party owing the same to the other, and on payment of the balance, if any, appearing due from the respondent to the appellant, he, the appellant, should execute to the

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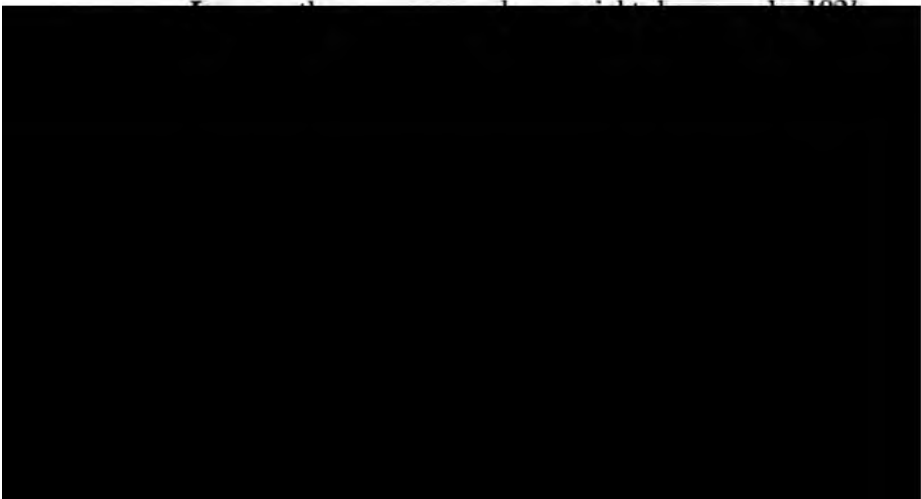
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(a) Longfield and Towns. 479, and 5 Irish Equity Reports.

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respondent a proper deed of conveyance of his portion of the lands.

The Remembrancer by his report, dated the 4th of *July*, 1842, found that the respondent became the purchaser of sixteen acres of the land of *Lisbane* in *May* 1819, and that in *May* 1822, the *Lowrys* had paid 39*l.* 7*s.* 10*d.* to the receiver in the cause of *Scott v. Knox* for arrears of renewal fines, interest, and costs of renewal which had then become due out of the whole of the lands; and that in *May* 1829, they paid a further sum of 63*l.* 10*s.* 5½*d.* for the renewal fines due out of the whole of the lands from *May* 1822 till *November* 1825; and that in *February* 1830 the appellant paid 64*l.* 13*s.* 3½*d.* for the renewal fines, which became due out of the whole of the lands from *November* 1825 till *May* 1829, with interest thereon, and costs of lease. And he found that the respondent's proportions of such several renewal fines thereon, interest, and costs of renewal, amounted respectively to 13*l.* 9*s.* 3*d.*, 12*l.* 3*s.*, and 21*l.* 10*s.* 4*d.* And he stated that he had been unable to tax the costs due, and theretofore incurred by the respondent under the decree of *June* 1826, in consequence of the appellant's having refused to furnish those costs; but he set off against such costs the costs to which the respondent was declared to be entitled under this decree. And he found that the



the sums which he found due to the respondent on foot of the sums so received, or which might have been received out of his proportion of the said lands, and also the sums paid by him on foot of the former decree, against the sums due by him as his proportion of the renewal fines and costs of renewal with interest thereon, from the several times when the same were respectively paid by the *Lowrys* and by the appellant, he (the remembrancer) found that there was due to the respondent the sum of 494*l.* 15*s.* 4*d.*

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No objections were taken to this report before the Remembrancer, and it was confirmed without opposition by an order dated the 22nd of *November*, 1842. A draft conveyance of the respondent's part of the lands as settled by the Remembrancer was tendered to the appellant, but he refused to execute it, alleging that he intended to appeal against the decree; and he accordingly presented his petition of appeal to this House in *February* 1843.

The appellant afterwards applied to the Court for leave to open the report, and to file a discharge to the respondent's charge before the Remembrancer, on the ground, as alleged in his affidavit in support of the application, that he did not file a discharge before or object to the report, because he then supposed that his appeal against the decree would be affected by his recognizing any proceedings taken under it, and that all such proceedings were in effect stayed by the appeal, but on consultation with his English counsel on the appeal, he was informed of his mistake in practice. The Court refused the application with costs, by an order dated the 24th of *June*, 1843 (*b*).

An appeal was also presented against that order.

Mr. *Turner* and Mr. *Purvis* (with whom was Mr. *Bates*) for the appellant:—All the benefits of the decree

(*b*) *Thomas Patton* died a few days before, and the suit and the appeal were revived by his executors.

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of 1826 were forfeited by *Patton's* neglect to prosecute the inquiries that were thereby directed, and to pay the renewal fines that accrued subsequently. He was in embarrassed circumstances, unable to redeem and hold the lands, and was glad to enter into an agreement with the appellant to become his tenant of part of them at 30s. an acre. The decree is erroneous in not directing the accounts to be taken according to that agreement. This decree is inconsistent with the original decree. There are material variances between them. The latter directs accounts of the value of *Patton's* lands while they were in possession of the *Lowrys* and of the appellant respectively; and the appellant is made to account for not only what he made of the lands, but also what the *Lowrys* made of them before the conveyance of their interest to the appellant. He did not purchase their interest subject to any lien of that sort, and he could not justly be held responsible.

It is not denied that the accounts were taken *ex parte* under the decree of 1842, and that credit was not given to the appellant for sums with which he was entitled to be credited. It seems he was misled by the practice that prevails in *Ireland*, and it was but common justice to give him an opportunity of correcting his mistake, and carrying in a discharge before the Remembrancer, so that if the

appellant and *Patton* is not binding. There is no proof of any sale by *Patton* of his interest in the lands to the appellant, and there is no consideration even alleged; so that the appeal in that respect fails. With respect to the opening of the accounts, it appears that the Remembrancer was attended by the appellant, or a person on his behalf, but he produced no accounts, and filed no discharge. The argument, therefore, on these two points, fails. Our only difficulty is as to the respondent's non-payment of the renewal fines, and that part of the decree which subjects the appellant to the payment of the occupation rent that was found due from the *Lowrys*: you will therefore confine your argument to that point.

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Mr. *W. P. Wood* and Mr. *Fleming* for the respondent :
—The proper view of the case is to consider the appellant as representing the *Lowrys* and *Murray* all through the proceedings. They were declared, by the decree of *June* 1826, to be trustees for *Patton* of his part of the lands. The appellant stands in their place as a purchaser of their interest, with full notice of the nature of it; for he had been their solicitor in the first suit. He received, to his own use, the several payments made by *Patton* in pursuance of the first decree, and for several years took advantage of his embarrassments to deprive him of the lands. The appellant also held himself out, from the time of the making of the former decree, as the owner of the property of the *Lowrys*, accepted the payments made by the respondent as owner, and necessarily led the respondent to believe that he adopted all the directions contained in that decree, and was willing to act upon them. Moreover the appellant is not prejudiced by the variation made by the latter decree, as he is entitled to set off the costs due to the *Lowrys*, under the former decree, against the payments ordered to be made by the *Lowrys* for their possession of the property, and he alleges that those costs to ex-

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ceed the amount which the *Lowrys* were liable to pay. Until the balance on such mutual accounts is ascertained and paid to the appellant, the respondent is not entitled to call for the conveyance, whilst under the former decree he was directed to have the conveyance made to him upon payment of his proportion of the renewal fines and the costs of the renewal. The late decree is, therefore, more beneficial to the appellant than the former decree.

Lord *Cottenham*.—This is an appeal from the Court of Exchequer in *Ireland*, raising an objection to the decree in the cause, and it proceeds also upon an application to refer the matter back to the Remembrancer to review his report. Now, the House has already expressed its opinion that the appellant has failed upon both those points, and that the Court below has come to a proper judgment, as against the appellant, upon the matters set forth as the grounds of appeal in the printed cases.

The only objection to the decree, appealed against, is as to the details, not raising any question of right between the parties—and which the appellant never brought under the consideration of the Court below. It is true that the House is of opinion that as to these details there is something which requires explanation; that, in fact, there is a kind of conflict between the original decree and the decree



the matter I have referred to be made in the decree, and that the appellant pay the costs of the appeal.

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Lord *Brougham*.—I am entirely of the same opinion. The body of the case has been disposed of without calling on the respondent. If the question of costs was to depend on the facts alone, I say that the facts of the case are emphatically so much in favour of the respondent that the ordinary rule, as to the appellant paying the costs, ought to apply. That he should do so when he fails is the general rule, and unless there is something special to take the case out of that rule, we must apply it here.

The question then is, whether this alteration arising upon the third point, is material, and is not only a fit alteration to be made, but is of such importance, and so affects the case as to differ it from the ordinary practice. Now, I entirely agree with my noble and learned friend, who has just addressed your Lordships, that in the circumstances, under which this necessity to vary the decree has arisen, and the case has been brought here, and in which this only alteration of the decree is now to be made, present no ground whatever and afford no reason for taking it out of the common rule, and for preventing the respondent from having his costs from the appellant. *Non constat*, but that if the error had been taken notice of in the Court below, it would have been remedied there, and then the case, as to the third point, would not have arisen. Then, why did they not take notice of it? It has been suggested only on this side of the water, and it never appears to have entered into the contemplation of the professional gentlemen in the Court below. I am clearly of opinion that this slight alteration makes no difference whatever in the application of the ordinary rule, but that the appellant here must, in the usual course, pay the costs.

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Lord *Campbell*.—I entirely agree in the view taken of this case by the noble lords who have preceded me. In all those matters on which this case has been properly brought before this House, the appellant has failed: the decree is affirmed upon the merits: the respondent succeeds on them and ought to have his costs. With regard to all that is necessarily brought before this House, and properly before this House, the appellant fails. With regard to those points, the matters of detail, upon which the decree has been varied, there was no absolute necessity to come to this House, because we have every reason to suppose that if an application had been made to the Court of Exchequer in *Ireland*, from which the appeal comes, all the variation that is now made in the decree would have been made without the necessity of appealing at all. Therefore, for the sake of justice between these parties, and for the sake of adhering to a very salutary rule, which we have laid down, I most heartily concur in the motion of my noble and learned friend.

[An order of a special nature was afterwards made by the House (see the Journals for the 6th of March, 1846), but it was in substance to vary the decree of 1842 (p. 499, *supra*), by expunging the last paragraph, "And on payment of the balance, &c.," and by introducing after the words, "the said lands," in the tenth line from the top of that page, words to this effect, viz., "That the appel-



The FROFFERS of HERIOT'S HOSPITAL	<i>Appellants.</i>	1846.
JOHN ROSS	<i>Respondent.</i>	March 13, 19.

If charity trustees are guilty of a breach of trust, the person thereby injured has no right to be indemnified by damages out of the trust fund. *Trust Fund. Damages, action for.*

The law is the same in this respect both in England and Scotland.




THIS was a summons of declarator and damages. The summons set forth that George Heriot, of the parish of St. Martin's in the Fields, in the county of Middlesex, jeweller to King James VI. of Scotland, and I. of England, by his last will and testament, dated on the 10th day of December, 1623, directed his debts and certain legacies to be paid, and then bequeathed all the rest and residue of his estate unto "the Provosts, Bailiffs, Ministers, and ordinary Council for the time being of the town of Edinburgh, in perpetuity, and for and towards the erecting and founding a hospital within the said town of Edinburgh, and for and towards the purchasing of certain lands in perpetuity to belong unto the said Hospital, to be employed for the maintenance, relief, bringing up, and education of so many poor fatherless boys, freemens' sons of that town, as the means which I give, and the yearly value of the lands so purchased by the said Provost, &c., shall amount and come unto." The Hospital was to be governed by such rules as the testator or Dr. Balcanquall (a friend of the testator, and specially named in his will,) might frame. Certain rules were framed, among which was one to the effect that no boys should be admitted before seven nor after ten years of age, with a direction that "the electors shall choose no burgess' children into these

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places, if their parents be well and sufficiently able to maintain them; and they shall not stay in the Hospital after they are of the age of sixteen years complete."

The summons alleged that the appellant was a candidate for admission into the Hospital, that he was the son of a poor freeman of Edinburgh, that his father was dead, that he was therefore poor and fatherless, and was in other respects, namely, as to age, qualified within the meaning of the founder's will and the regulations, and ought to have been admitted, but that the trustees had elected and admitted to the benefits of the said charity other applicants who were not fatherless, and were not, therefore, entitled to admission. The summons, therefore, prayed that the pursuer might be declared entitled to admission, and be ordered to be admitted, and inasmuch as the age within which he was eligible might in the mean time pass by, and he might thereby lose all right to election and benefit thereof it prayed: "And further in respect the pursuer has, in consequence of the repeated refusals of his said applications to be admitted to the benefit of the said institution, as before mentioned, suffered great hardships, &c., the feoffees of trust, and governors aforesaid, defenders, ought and should be decreed and ordained by decree of the said Lords to make payment to the pursuer of the sum of 500*l.* sterling, or some other sum, less or more, as the said Lords shall find in the course of the process to



tor, he said, "There may be abuses in the management, and the Lord Ordinary does think there are errors; but he apprehends that the Court cannot redress any such abuses or errors in the form of this action of damages." This Interlocutor was brought before the Judges of the Second Division, by whom the opinions of the other Judges were taken upon it, and in the end the Lords of the Second Division pronounced a judgment, in which they altered the Interlocutor of the Lord Ordinary, finding that the boy was eligible, and the authority for the proceedings before the Court competent; and, "therefore, with these findings, remit the case back to the Lord Ordinary to hear parties on the conclusions of the summons for reparation or damages, and to dispose thereof as may be consistent with the above findings." The Governors of the Hospital appealed against this decree on several grounds, but the only one on which the judgment of the House was ultimately given, was that which related to the right of the pursuer in the Court below to sue for damages under the circumstances disclosed in this case.

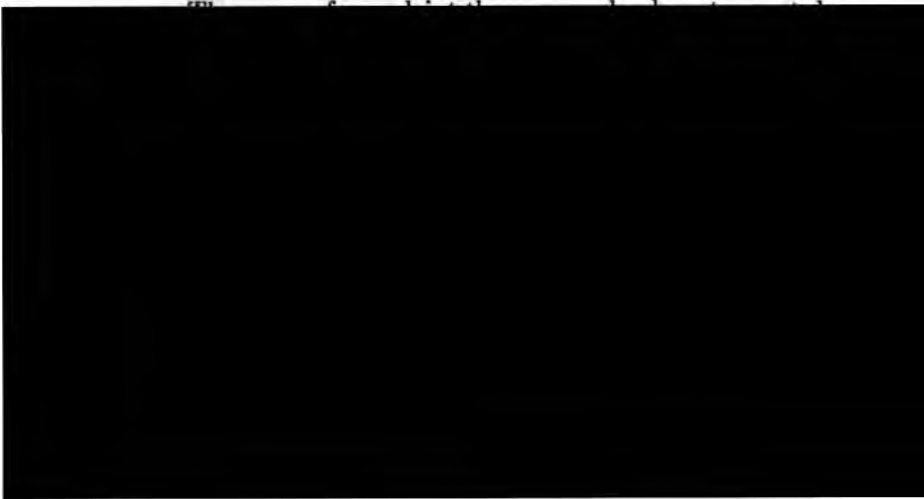
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The *Solicitor General* and Mr. *Anderson* for the appellants:—There has not been any thing done here which will entitle the pursuer to claim damages. In the first place the trustees are not bound to elect a boy who has lost his father, for he may be much less in need of the assistance of the Hospital than some boys whose fathers are still alive. But, at all events, if the trustees have committed an error in this respect, that error will not give the boy the right to sue for damages. The action for damages cannot be sustained, except where a vested right has been violated, or some personal wrong has been committed. Neither of these things has occurred here. But if it had, the pursuer would not have had a right to damages to be recovered out of the trust fund.

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It is not every injury that can give a right to recover damages out of a trust fund; *Duncan v. Findlater (a)*. There the action was against the trustees appointed under a public road act, for an injury occasioned by the negligence of the men in making the road, and this House held that the action was not maintainable. The law was in that case most fully discussed, both with reference to English and Scotch principles and authorities, and the difference of the law in the two countries was insisted on. But as to this matter, the House declared the law of the two countries to be the same, and established the proposition that for damages not occasioned in pursuance of the authority by which a trust fund was created, that fund could not be made answerable.

Mr. Turner and Mr. Bennett for the respondent:—It is said that this action, so far as it seeks for damages, is not maintainable, because the damages cannot come out of the trust fund, and the case of *Duncan v. Findlater* has been referred to in support of that argument. But that case does not govern the present. The circumstances of the two cases are entirely different. That was a suit in which it was sought to recover consequential damages from the holders of a trust fund, in respect of the negligence of a person who was alleged to be their servant.



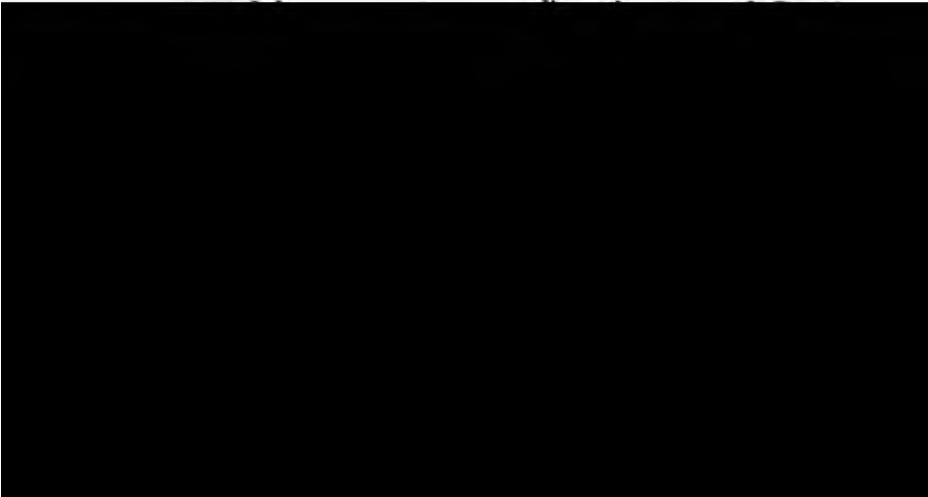
fited by it. His *primâ facie* claim on the fund is not denied by the other side ; but it is said that others had as good a claim as he, and that, at all events, the trustees of the fund had the right to elect between the different claimants. In this respect, therefore, the two cases are wholly different. But further, they are different in another respect. The act there done, in respect of which damages were claimed, was not an act done in carrying out the purposes of the statute. Here the act done, was done in carrying out the purposes of the trust ; it was the very act which the founder had desired and directed the trustees to do ; it was the act of administering the fund itself. The pursuer says, that that act was done in a wrongful manner, and that he has thereby been deprived of a benefit which the founder intended for him. There has, therefore, been a damage occasioned in respect of the administration of the fund, and the proper and natural compensation for that damage has been lost by the lapse of time. The injury has been committed by the trustees in their administration of the trust fund, and there clearly ought to be a remedy against those who have committed it, and he that suffered from it ought to be indemnified. If the trustees are made liable they will be entitled to be repaid out of the trust fund, for this is a mistake in the administration of the trust fund, and is not like an improper and fraudulent act by the trustees in direct violation and breach of their trust. They intended to carry out the trust, but have fallen into error in their mode of doing it. [Lord Brougham.—But does that give this party a right to go upon the trust fund for compensation ? Lord Campbell.—How can you say, that no wrong but a mere mistake has been committed, and yet that the trustees are to be liable in damages ?] It is clear that there has been an injury suffered by this boy in respect of his not being admitted, and that this has arisen from the erroneous act of the trustees. The Court, if it declares him entitled to be admitted,

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will still order the expences of the trustees to be paid out of the fund. [Lord *Cottenham*.—The first principle of law is of course to reimburse the trustees all expences properly incurred by them in discharge of the duties of the trust; but will the same course be pursued if the trustees act wrongfully?] The nearest case to the present is one where there has been an unwarranted appointment to the benefits of a trust, and the Court, nevertheless, permits the person erroneously appointed to continue to enjoy its benefits. There are cases of that sort, and they shew that where there has been an error in the application of a trust fund, the Court will not always rigidly insist on the performance of the letter of the trust, but will permit the trust fund to be to that extent applied to the benefit of an individual not in strictness entitled to it. The same principle is applicable here.

Lord Cottenham.—The case now before the House undoubtedly raises a question of considerable importance connected with the administration of this charity; but it appears to me that there is one point which necessarily arises, and on which it is the duty of the House to dispose of the case without further proceeding in it. With respect to this point, it is not necessary to hear any observations in reply on the part of the appellant—it is one of



dividual trustee, nor is this a personal action against any of them; it is a proceeding against them in their corporate capacity as feoffees of the charity funds. He does not in terms pray for the payment of damages from the trust funds, but still as the summons is constituted, he cannot receive damages, should he receive them at all, except from those funds; and it has been throughout the proceedings understood that, if there are to be any damages at all, they must be paid out of the trust fund. The question then comes to this,—whether by the law of *Scotland* a person who claims damages from those who are managers of a trust fund, in respect of their management of that fund, can make it liable in payment. It is obvious that it would be a direct violation, in all cases, of the purposes of a trust, if this could be done; for there is not any person who ever created a trust fund that provided for payment out of it of damages to be recovered from those who had the management of the fund. No such provision has been made here. There is a trust, and there are persons intended to manage it for the benefit of those who are to be the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose.

When the question came before this House, in the case of *Duncan v. Findlater (c)*, your Lordships were surprised to find that such a mode of proceeding had been adopted in *Scotland*. There had been no direct decision as to the right; yet it was distinctly stated that in more than one case such had been the practice there. The House expressed a strong opinion in disapprobation of such a practice; and observations were made which it might have been supposed would have led to a deliberate consideration in the Court of Session, whether such a

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practice was in accordance with the law of *Scotland*, or indeed of any civilised country.

It is true that the summons in this case appears to have been issued before the case of *Duncan v. Findlater* was decided in this House, which will account for these proceedings not having been stopped at once; but that does not explain to me how this point came to be overlooked in the course of the subsequent proceedings in the cause. Only one of the Judges, Lord *Mackenzie*, directed his attention to the matter, and he said, "In my view, I should have had difficulty in giving an opinion that damages were due either by the parties who rejected the pursuer personally, or out of the funds of the institution. The latter is not, I think, asked;"—this is a mistake, for the only damages to be paid must have been paid, if at all, out of the trust fund;—"and I should have great difficulty indeed to adopt it, for I do not think it is in the power of the governors to cause such an application of the funds by any act of theirs." That learned Judge here took a correct view of what was the duty of the trustees, and how inconsistent with that duty it would have been for the Court to adopt a different rule, and to direct payment of damages out of the trust fund.

Mr. *Turner* has referred to the practice which has in some cases existed in this country, and which, he argues,

this country for any judgment of a Court, directing trust funds to be applied to any purpose different from that for which they were originally given. In the kind of case referred to, the Court, merely from circumstances of compassion, abstains from any active interference. The reference, such as it was, was certainly to a case the nearest like the present, but that is very far from sanctioning the course proposed to be adopted here.

As to the costs, the first object of a trust is to indemnify those who administer it against any costs properly incurred in its administration. In cases where another party is in the wrong, as where, for instance, if such an improbable case can be presumed, the Attorney General files an improper information, such as an information without a relator, the Court would give the trustees costs out of the fund. But there the proceeding would be to reimburse the trustee costs which he had properly incurred, such reimbursement being in fact the first trust to be executed. But here the Court is asked to award damages to this individual—damages to be given out of the trust funds—to the prejudice of other persons who would be entitled to those funds if they were not so improperly diverted.

Finding, as I do, that there is no direct authority in the law of *Scotland* for allowing damages in a case of this sort to be taken out of trust funds, a matter very clearly settled in the case of *Duncan v. Findlater* (c), and feeling convinced that so to allow them would be itself a breach of duty, I am of opinion that it is the duty of this House to discountenance the practice, and to decide the case on a ground so perfectly clear and free from doubt as this is.

The findings of the Lord Ordinary on the reclaiming note present the only difficulty, but it is not one of any

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(c) *Ante*, Vol. VI., p. 894; Macl. & Rob. 911.

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serious kind. They are very innocent findings. They merely declare the eligibility of the pursuer. On that there is no doubt. He was fatherless, he had some qualification, and the question was whether he was entitled at all events to admission before other claimants. As he was not admitted, the question is whether he is to get damages out of the trust fund? If not, he cannot get anything at all. This finding was not brought before the Inner House for discussion, but it has been brought here. It is not necessary to decide on the competency of the appeal upon the other points, for they do not touch the ground on which the decision of this House must ultimately turn. It is not important whether the Lord Ordinary was right or wrong in holding the pursuer not to have a vested interest in the funds of the charity, so as to exclude the Governors of the Hospital from exercising any discretion as to his claim, for there is another ground on which we must come to the same conclusion—as the pursuer's only remedy in this suit would have been the payment of damages from the trust fund, which was not in any manner liable to make such a payment, the suit itself proposed the attainment of no lawful end, and the defenders ought to have been assoilzied from the conclusions of the summons.

to give damages, if damages are due at all, not against the majority, the wrong-doers alone, but against the whole as a corporate body—against those who dissented from the majority; in other words, against the trust fund, which the whole body has the duty to administer. This alone was in the contemplation of the summons. The charge is, that the Governors of the Hospital have illegally and improperly done the act in question; and therefore because the trustees have violated the statute, therefore—what? not that they shall themselves pay the damages, but that the trust fund which they administer shall be made answerable for their misconduct. The finding on this point is wrong, and the decree of the Court below as to the damages must be reversed. That being so, there is no occasion to enquire whether the interlocutor of Lord *Moncrieff* is in other respects right, for this error goes to the very root of the whole action. We must reverse that part which was not reclaimed against to the Inner House, but which is now brought before us. It is much to be regretted, though the suit was instituted before the case of *Duncan v. Findlater* was decided, that the Court did not, when that case had been decided, pay attention to that decision, which authoritatively lays down the law. It was not, however, for the first time that that case laid down the law, for there was not any old case shewing that the law was, what, at that time, the Court of Session stated it to be. It would have been better had the Court paid more attention to the high authority of that case as decided in this House, than here appears to have been paid to it.

Lord *Campbell*.—I am of opinion that on the 14th *February*, 1843, when this interlocutor was pronounced, the Court ought to have dismissed this action: it could confer no benefit upon the pursuer at that time, unless by the recovery of damages. The Inner House remitted the

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case to the Lord Ordinary for the purpose of assessing the amount of damages, so that the Judges of the Inner House must have been of opinion when that remit was made, that damages in the manner prayed by the summons might be recovered. I cannot help feeling great astonishment that such a notion should have prevailed in *Scotland*. It seems to have been thought, that if charity trustees are guilty of a breach of trust, the persons damnified thereby have a right to be indemnified out of the trust funds. That is contrary to all reason, and justice, and common sense. Such a perversion of the intention of the donor would lead to most inconvenient consequences. The trustees would in that case be indemnified against the consequences of their own misconduct, and the real object of the charity would be defeated. If there has been a wrong committed by the charity trustees, if there has been a *damnum cum injuria*, an action can be maintained, aye, even against the members of a Court—we held that in the *Auchterarder Case* (e)—that the ministers who disobeyed the mandate of this House, were liable to pay damages to the person whom their misconduct had damnified; but if there had been trust funds in the hands of those ministers, those funds would not have been answerable. Damages are to be paid from the pocket of the wrong-doer, not from a trust fund. A

strictly enforcing the rules of law. The case of *Duncan v. Findlater* (f) is directly in point—that decision gave universal satisfaction, and the mistaken practice which it overthrew, has since been universally scouted. It is to be hoped that we shall never again hear of a decision like the present, contrary to reason, sense, and justice, and which is wholly unsupported by authority, and is contrary to the law of *Scotland*. That being so, the damages claimed here the pursuer cannot obtain, and if so, he cannot derive any advantage in this form of action, and consequently it ought not to have been instituted or not allowed to proceed. On these grounds, I am of opinion that we must reverse the decree of the Court of Session, and pronounce the judgment which ought to have been pronounced in *February* 1843.

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Lord *Cottenham* proposed, and the Lords agreed to the following order :—

That the interlocutor of the Lords of the Second Division of the Court of Session complained of in this appeal, be and the same is hereby reversed, and that the interlocutor of the Lord Ordinary be varied by inserting the following words: “ But in respect, that the pursuer’s case was under the circumstances reduced to a question of damages, and that the only damages, if any, which could be recovered by the pursuer, would be to be paid out of the trust funds, to which such funds were not in any respect liable: therefore assoilzies the defenders accordingly.”

(f) *Ante*, Vol. VI., p. 894; Macl. & Rob. 911.

1845. HENRY FARRAN DARLEY - *Plaintiff in Error.*
 May 2-7;
 July 1. The QUEEN, at the Relation of }
 1846. ROBERT KINAHAN - } *Defendant in Error.*
 May 19.

Office. *Quo*
Warranto.

A proceeding by information in the nature of *quo warranto* will lie for usurping any office, whether created by Charter of the Crown alone, or by the Crown with the consent of Parliament, provided the office be of a public nature and a substantive office, and not merely the function or employment of a deputy or servant held at the will and pleasure of others.

The office of Treasurer of the public money of the county of the city of *Dublin* is an office for which an information in the nature of a *quo warranto* will lie.



THIS was a writ of error on a judgment in the Exchequer Chamber in *Ireland*, affirming a judgment of the Queen's Bench there in the case of an information in the nature of a *quo warranto* filed against the holder of the office of treasurer of the county of the city of *Dublin*.

This office having become vacant by the death of the late treasurer, a meeting was held on the 2d of *April*, 1836, for the purpose of electing a new treasurer. The



ever. The police magistrates had not, however, claimed to vote at a prior election of a treasurer, and the Lord Mayor who held the meeting for this election, did not convene or summon any magistrates save the aldermen. Five out of the eight police magistrates, however, attended the meeting, without being summoned, and claimed a right to vote at the election, and they respectively tendered their votes for the plaintiff in error. The Lord Mayor refused to receive their votes, and Mr. *Smyth* having a majority of the votes of the aldermen, was declared by the Lord Mayor to be duly elected, and immediately entered into the required recognizances. The plaintiff in error, conceiving himself aggrieved by the Lord Mayor's decision as to the right of the police magistrates to vote, applied for, and obtained an information in the nature of a *quo warranto* to be exhibited on behalf of the Queen, and at the relation of the plaintiff in error, in the Court of Queen's Bench of *Ireland*, on the 7th of *May*, 1836, and on the 26th of *November*, 1838, that Court, being of opinion that the votes of the police magistrates had been improperly refused by the Lord Mayor, pronounced judgment of ouster against Mr. *Smyth* (a). On the 31st of *January* following, the plaintiff in error applied to the Court for a rule to shew cause why a writ of mandamus should not issue to the Lord Mayor of *Dublin*, to command him to convene the board of magistrates, as directed by the 49 Geo. III., c. 20, and declare the plaintiff in error treasurer (b). The Lord Mayor showed cause against the writ, and set forth the proceedings which had taken place at the meeting held on the 2d of *April*, 1836, and, in addition to another point (not now necessary to be adverted to), showed, as cause against the conditional mandamus, the meeting of that day had not been duly convened, for that the three police magistrates who were absent from the said meeting, were then living, and not-

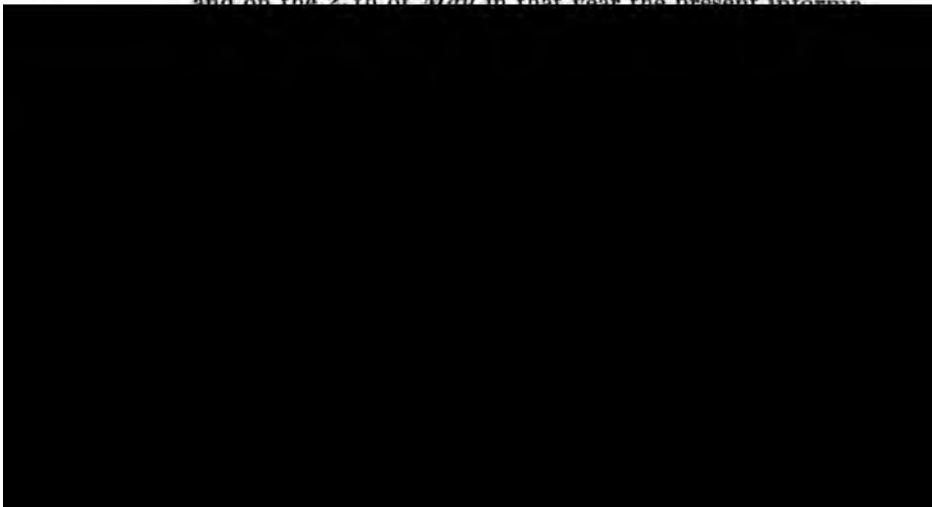
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(a) 1 Jebb & Syme's Rep. 164. (b) *Ibid.*, p. 468.

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withstanding, had not been summoned or convened, but he neglected to add that they were within summons. In consequence of this neglect, the Court, considering the other reason insufficient, held the return bad, and issued a peremptory mandamus to the Lord Mayor, directing him to convene the board of magistrates, and thereat to declare the plaintiff in error treasurer of the public money of the city of *Dublin*, and to accept his recognizances; but the Court in awarding the peremptory mandamus expressly declared that it did not thereby mean to conclude the rights of Mr. *Smyth* (who had been, as before mentioned, ousted), in case he should be advised to make an application for a *quo warranto* against the plaintiff in error (c). A meeting of the board of magistrates was accordingly convened and met upon the 22d day of *June*, 1839, and the plaintiff in error was then and there declared treasurer, and afterwards entered into the required securities.

On the 16th *November* following, Mr. *Kinahan*, the relator in the present information, obtained a rule for leave to file an information in the nature of a *quo warranto* against the plaintiff in error. On the 28th day of *January*, 1840, the plaintiff in error showed cause against the rule, and the Court, after a lengthened argument on behalf of the plaintiff in error, made the rule absolute (d); and on the 27th of *May* in that year the present informa-



information in the nature of a *quo warranto* ought to have been brought or could be sustained. To the sixth and seventh pleas the defendant in error demurred.

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Previously to the 33 Geo. II., treasurers of the public money in *Ireland* appear to have been elected or appointed by the justices of the peace of the respective counties and counties of cities, and such authority to elect and the mode of election were derived from usage, and not from any legislative provision. A statute was passed in the last-mentioned year (33 Geo. II., c. 13), which, after reciting "that doubts had arisen concerning the manner of appointment of treasurers of counties," provided that whenever a vacancy should happen by death, misbehaviour, or resignation of a county treasurer, the justices of the county in which such vacancy should occur, should appoint a proper person to be treasurer, and that the person so appointed should enter into a recognizance for 1000*l.*, and procure two sufficient sureties, who should bind themselves in 500*l.* each for his good conduct in the office, and his justly accounting for all public monies received by him." The provisions of this statute were varied by the act 13 and 14 Geo. III., c. 18, which confined the right of voting on the election of treasurers to justices of the peace having a freehold estate of 100*l.* a year, and directed that seven justices so qualified should be present at every election. The latter act also provided that if any treasurer should be convicted either by indictment or presentment of any of the several frauds, neglects, or offences particularly specified in the act, he should be fined and dismissed from his office, and be rendered incapable of being again appointed treasurer for any county in *Ireland*. It also raised the amount in which the treasurer and his two sureties were to be bound from 1000*l.* to 10,000*l.* for the treasurer, and from 500*l.* to 5000*l.* for each surety, and further provided that the Court of Queen's Bench in *Dublin*, and the

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Judges of assize in the other counties should, if so required by the grand jury of any county in *Ireland*, examine the treasurer of that county as to the continued solvency of his sureties, and if the treasurer should refuse to be examined, or upon being so required, fail or neglect to procure other sureties, or another surety, the Judge who required him to answer or to procure the other sureties or surety, should dismiss him from his office of treasurer.

The last-mentioned act was the legislative provision in force for the appointment of county treasurers in *Ireland*, and the regulation of the office, when the herein-after mentioned statute of 49 Geo. III., c. xx. was passed for "the better regulation of the mode of election and office of treasurer of the public money of the county of the city of *Dublin*."

The corporation of the city of *Dublin* is a corporation by prescription, and the only justices of the peace for that city or for the county of the city of *Dublin*, until the act of 48 Geo. III., c. 140, was passed (which provided for the appointment of magistrates of police), were members of the corporation. A charter of the 1 Geo. II. had provided that all the aldermen who had been lord mayors of the city should be justices of the peace for the county of the city, and the act 33 Geo. II., c. 16, s. 18, added to the number of magistrates by providing that all

the corporation extended, and the treasurer appears to have been in every respect identified with the corporation, and to have derived his authority solely from that body.

The first statute which expressly refers to the election of the treasurer of the public money of the county of the city of *Dublin* is the 13 & 14 Geo. III., c. 34, which provides, that if the grand jury of the county of the city of *Dublin* and the Court of King's Bench shall not approve of the security given by the treasurer at quarter sessions, or if no security shall have been there given, the treasurer shall, at the term for the city following his election, bind himself by recognizance in the sum of 10,000*l.*, and procure two sureties, to be approved of by the grand jury and Court of King's Bench, who shall bind themselves jointly and severally in the same sum, the condition of such recognizances being that the treasurer shall well and truly execute his office of treasurer of the public money, and truly account for all sums which shall come to his hands: and the act further provides, that, in case the treasurer shall neglect to give the recognizances, or procure the sureties, he shall, by such neglect or omission, vacate his office; and that the justices of the peace for the said county, at the next quarter sessions, shall proceed to the election of a new treasurer. The act of the 26 Geo. III., c. 14, s. 67, reduced the amount in which the treasurer and his sureties were respectively to bind themselves from 10,000*l.* to 2000*l.* The subsequent statute of 33 Geo. III., c. 56, contains various provisions in relation to the duties of the treasurer, and particularly directs, by the fourth section, that he shall applot and assess on the several parishes in the said city and the county thereof, such public money as shall, from time to time, be presented, to be raised by the grand juries, and insert in warrants the said applotment and assessment, and the uses for which the sums of money are respectively raised; and the Lord Mayor is required and directed to sign the said warrants, and cause

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the same to be delivered to the churchwardens of the several parishes of the said city "as has been from time immemorial accustomed;" but the act contains no provision for the election, appointment, or dismission of the treasurer.

The last-mentioned act was followed by the statute 49 Geo. III., c. xx., which is the regulating statute as to the appointment and office of treasurer of the public money of the county of the city of *Dublin*.

This act (sect. 2) recited that doubts had arisen whether the treasurer should not be elected in the manner prescribed by the hereinbefore mentioned act of the 13 & 14 Geo. III., c. 18, and number of justices of the peace for the said county, and of the several persons who had served as Lord Mayor, being usually persons in trade, it could scarcely happen that a sufficient number of persons, qualified as directed by that act, confirmed the election theretofore made by the magistrates of the said city of the then treasurer.

The third section thus provides for the election of the treasurer:—"Whenever the treasurership of the city of *Dublin* shall be vacant by the death, resignation, removal, or dismission of the present or any future treasurer, the Lord Mayor of the said city, for the time being, shall, within twenty-one days after such vacancy, convene the board of magistrates of the county of the said city of



chairman, and shall take the votes of the other magistrates, and shall not himself give his vote, except in the case of equality of voices." It then declared that the treasurer should enter into his own recognizance for 5000*l.*, and procure two sureties, who should severally bind themselves in half that sum, the condition of such recognizances being, that the treasurer should duly account in the manner provided in the act, and duly and faithfully discharge the duties of his said office. It provided that unless the sureties should make the affidavit as to solvency required by the act, the election should be void, and a subsequent one be had. Power was given to the Judges of the Court of King's Bench, in case the Court should be required by the grand jury of the county, or otherwise, on sufficient cause, to examine the treasurer or any other person or persons as to the continued solvency of the sureties, and generally as to any act relative to the said office; and if the said Court apprehended that either or both the sureties was or were dead, or insufficient, and the treasurer did not procure some other surety or sureties in the place of the one or both objected to by the Court, or if the Court should otherwise see sufficient cause, it was directed and required to dismiss the treasurer from his office. The act subsequently fixed the amount of salary of the treasurer, and provided for his making oath before one of the Judges of the Court of King's Bench, at each term, as to the amount of public money received by him, and made certain provisions for the collection of public monies, and the application of certain sums for particular purposes.

There were several questions argued before the Court of Queen's Bench, and afterwards, on error, before the Court of Exchequer Chamber, and all of them were raised for discussion on the writ of error brought to this House. The case was twice argued before this House, but the first argument was not completely heard, as the Lords

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intimated a wish that the case should be argued in the presence of the Judges. Their Lordships, at the same time, desired that the arguments should be confined to the question whether the office of treasurer of the public money for the county of the city of *Dublin* was an office for which an information in the nature of a *quo warranto* would lie.

The Judges who attended the hearing of the case were Lord Chief Justice *Tindal*; Justices *Patteson*, *Williams*, *Coleridge*, *Coltman*, *Maule*, *Wightman*, and *Creswell*; and Barons *Parke*, *Alderson*, and *Platt*.

Mr. Serjeant *Manning* and Mr. *J. Henderson* for the plaintiff in error :—

The question is, whether the office of treasurer of the county of the city of *Dublin* is such an office as that an information in the nature of *quo warranto* will lie for it? If not, the judgment of the Court below must be reversed.

The office of treasurer of the city of *Dublin* is not a corporate office, nor is it an office invested with a public trust or with the exercise of any royal authority, and if so, no *quo warranto* will lie. It is like the office of treasurer of a county, an office subject to the justices of the county, and is not of that class of offices for which such a proceeding is maintainable. The party complaining might have had a writ of assize or might have effectually



King v. Hanley (g). The true rule as to cases in which this proceeding is maintainable, is laid down by Lord Kenyon in *The King v. Shepherd* (h), where it was said, "this was not a usurpation on the rights or prerogatives of the Crown, for which only the old writ of *quo warranto* lay; and an information in the nature of a *quo warranto* could only be granted in such cases." The office is not one which is invested with any public trust or authority. [Lord Brougham.—But is the rule as to offices in respect of which an information in the nature of a *quo warranto* will lie, so confined? Do not offices relating to the administration of justice, to the exercise of any rights of the Crown, or of any corporation authority, or those of making returns in the cases of elections of members of Parliament, likewise come within the class of cases subject to these informations?] They may do so, but this office does not fall within any one of those descriptions. An information in the nature of a *quo warranto* is a severe proceeding, and therefore is not favoured by the law. It is contrary to all ordinary rules of proceeding in matters of possession, to treat the person in possession as not rightly so. The ordinary rule of law is *potior est conditio possidentis*. It is clearly the right of the Crown to be protected in the executive functions of the government, and, therefore, in any office which relates to the administration of public justice, the Crown may have a *quo warranto*. The stewardship of a Court leet, *The King v. Hulston* (i), is an office of this kind. But the same case shews that a *quo warranto* will not lie to the steward of a Court baron, for that office concerns only private rights. Where, therefore, the rights of the Crown are not concerned, the *quo warranto* will not lie. The mere importance of an office will not justify the issuing of

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(g) 3 Ad. & El. 463, n.

(i) Str. 621.

(h) 4 Term Rep. 381.

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a *quo warranto*, for the guardians of the poor are officers of great importance in a parish or union, yet in *The King v. The Aston Union* (*j*), a writ of this kind was refused in respect of such officers. The peculiar purpose of the process is to vindicate the rights of the Crown. The relator here does not shew that he is entitled to this process. [Lord Brougham.—In the case of the trustees of *Whitehaven Harbour*, *The King v. Nicholson* (*k*), those persons were held liable to a *quo warranto*, because their office related to the exercise of a public trust. That case is in accordance with the doctrine as laid down in *Comyns* (*l*).] The case of *The King v. Nicholson* is not fully nor satisfactorily reported. The extent of this jurisdiction is not so large as the general words there used might seem to imply. *The King v. Neal* (*m*) has often been referred to as shewing that an information in the nature of a *quo warranto* would lie for the office of Master of the Coopers' Company, but when properly considered, that case appears merely to have decided that there having been a demurrer to the information, the allegation in the information, that the office was one of public trust must be treated as confessed on the face of the pleadings. That case, therefore, carries the rule no further than this, that for a public office of trust an information will lie. Here the office is not of that kind, it is a mere ministerial office, and therefore the writ

of a *quo warranto* will not lie, except for some franchise usurped upon the Crown, or for the usurpation of some franchise which can only lawfully be enjoyed by grant from the Crown. The case of *The King v. The Justices of Herefordshire* (n) is not only in point, but is decisive upon the question. There the office was that of a county treasurer, and it had been created by Act of Parliament, and it was held that an information in the nature of a *quo warranto* would not lie. The case of *The King v. Highmore* (o), which seems to be governed by a different rule, is no authority at all; for the judgment of the Court there proceeded expressly on the ground that the point might be raised on error, and therefore the Court would not set aside the writ. In *The King v. Ramsden* (p), an information was refused, and that case referred to, and adopted another where a similar course had been pursued; *The King v. Hanley* (q). In the *Aston Union Case* (r), the previous case of *The King v. Ramsden* was expressly confirmed; and an information was refused for the office of guardian of the poor. The whole current of modern authorities runs therefore in one direction; there is nothing to justify the decision in this case which is opposed to these authorities, and is not in any way excepted from their operation. The judgment of the Court below must be reversed.

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Mr. Napier and Mr. Fleming for the defendant in error.—This is an important public office; and if a *quo warranto* will not lie, then the party who is unjustly excluded from the office would be without a remedy. That itself is a strong reason in favour of allowing the information. It is not to be compared to the office of the treasurer of a county. The treasurer here assesses the

(n) 1 Chit. Rep. 700.

(q) 3 Ad. & El. 463, n.

(o) 5 Barn. & Ald. 771.

(r) 6 Ad. & El. 784.

(p) 3 Ad. & El. 456.

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monies to be levied, and is responsible for all the disbursements which are required for the poor of *Dublin*; he is elected under the provisions of a particular statute, which regulates and defines his duties. The county treasurer is dismissable at the pleasure of the Justices at the General or Quarter Sessions,—12 Geo. II., c. 29, s. 11: but the treasurer of *Dublin* has a freehold office, and the 33 Geo. III., c. 56, s. 4, (which is adopted and confirmed by the later statutes,) authorises him to applot and assess such public money as from time to time shall be directed by the grand jury to be levied; he takes the recognizances of the collectors; he appoints them, and they pay the money collected into his hands. Under the 1 & 2 Vict., c. 51, ss. 3, 4, and 5, he is to amend the valuation and applotment, and may call on the grand jury for a copy of the alterations made in the cess, in order to enable him to perform this duty. [Lord *Brougham*.—But may not the party complaining in a case of this kind bring an action for intrusion?] He may if the other has been elected to the office, but that will not advance him in his own claim to the office. In every respect this is an office of public trust and emolument, and it is in its nature permanent. It therefore comes within the description of those offices in which, for the protection of the interests of the public, the Court of Queen's Bench will interfere by way of

there said "By an examination of the cases, the distinction between the power of the Attorney General and the Master of the Crown Office seems to be this,—that the power of the latter is confined to cases which concern the public government, whereas the power of the former extends also to cases which only concern the private rights of the Crown." If it can be truly alleged that an office is an office which concerns the public interest, and involves the discharge of a public trust and of public duties, the minute nature of those duties can only raise the question whether the circumstances are sufficient to justify the issuing of an information in the nature of a *quo warranto* against any one who usurps the office, but the right to issue the information cannot be doubted; *Wilkes v. The King* (u), *The King v. The Duke of Bedford* (v), *The King v. Boyles* (w). [Lord Brougham.—But in each of those cases, the parties applying to the Court for leave to file the information shew the office to be one which concerns the administration of public justice.] The minute nature of the duties of a public office may raise the question of the propriety of the Court granting leave to file such an information in the particular case; but there can be no doubt that the Court has the power to grant it. In *The King v. Beedle* (x), it was granted in the case of commissioners for paving under a local act. There the commissioners were elected by the inhabitants; and that case must be considered as having overruled *The King v. Hanley* (y). [Lord Brougham.—Yet *The King v. Hanley* was quoted and relied on in *The King v. Ramsden* (z), where it was held that, in a case of that kind, an informa-

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| (u) Wilmot's Notes, 326. | (w) 2 Lord Raym. 1559; |
| (v) 1 Barnardiston, 282, | Str. 836; Fitzg. 82. |
| cited in <i>The King v. Atwood</i> , 4 | (x) 3 Ad. & El. 467. |
| Barn. & Ad. 494. | (y) 3 Ad. & El. 463, n. |
| | (z) <i>Id.</i> 456. |

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tion would not lie.] That case can hardly be treated as a positive decision. It cannot be supported on principle. In *The King v. Francis (a)*, it was said that an information in the nature of a *quo warranto* was a proceeding of a civil nature, and therefore the Court granted a rule for a new trial in it.

In all the cases in which the application has been refused, it has been so solely upon the ground that, in the discretion of the Court, its interference in that particular case was not necessary. In *The King v. Cann (b)*, which was the case of the steward of a Court leet, the information was refused by the Court in the exercise of its discretion, as the right might be tried in a civil action. Even the case of *The King v. Shepherd (c)* shews no more than this ; and no doubt where there are other means of trying the title, the Court of Queen's Bench is jealous of allowing this style of proceeding. The anonymous case in *Barnardiston (d)* is to that effect. And it is always refused where a party is the servant of another. [Lord Campbell.—Because he has not an estate in his office.] Here the treasurer is not the servant of any body, and he cannot, like the county treasurer, be dismissed by the Justices. He is amenable only to the Court of Queen's Bench. In the case of *The King v. The Justices of Herefordshire*, the party was merely

least no such convenient, mode of trying the right. In this case there is no other remedy open to the parties, for the office is full. For such a reason an information was granted in *The King v. The Mayor and Aldermen of Hertford* (f), *The King v. The Mayor of Colchester* (g), and *The King v. Bingham* (h). That is the true principle on which an information in the nature of a *quo warranto* may be granted; and there is not any authority for a supposed distinction between ministerial and other officers. *Kyd on Corporations* (i), *Buller's Nisi Prius* (j), *Blackstone's Commentaries* (k), and *Tancred on Quo Warranto* (l), all adopt this view of the subject. In the case of *The King v. Nicholson* (m), an information in the nature of a *quo warranto* was granted for usurping a power which never had been a franchise of the Crown, because, though it was a trust created by a private Act of Parliament, it affected public interests. That is a very strong case. And in the case of *The King v. Neal* (n), an information in the nature of a *quo warranto* was allowed in the instance of the office of master of the Cooper's Company. And in *The King v. Boyles* (o), on an objection to the nature of the office, and that it was not shewn that the vill was a corporate town, the Court said, "if it is alleged to be an office which concerns the public, that is sufficient." The principles deducible from these authorities shew that the judgment of the Court below is correct, and that it ought to be affirmed.

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Mr. Serjeant *Manning*, in reply.—The case of *The*

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| (f) 1 Salk. 374; 1 Lord Raym. 426. | (j) p. 410. |
| (g) 2 Term Rep. 259. | (k) Vol. III., p. 202. |
| (h) 2 East, 308; see also <i>The King v. McKay</i> , 4 Barn. & Cr. 451. | (l) p. 20, <i>et seq.</i> |
| (i) p. 418. | (m) Str. 299. |
| | (n) Cas. temp. Hardw. 106. |
| | (o) 2 Lord Raym. 1559; Str. 836. |

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King v. Neal (p) is no authority for the other side ; for there the defendant had estopped himself by the form of his own demurrer, from objecting that the *quo warranto* would not lie. His demurrer was taken as an admission that the office was one for which an information of that kind was maintainable. The case of *The King v. Hall* was one relating to the administration of public justice, and that case is therefore inapplicable to the present. The rule, as stated in *The King v. Shepherd*, shows that these informations must be confined to instances of usurpations on the rights of the Crown.

Lord Brougham.—We all feel that there have been conflicting decisions on this subject. The case in *Lord Raymond* (q) is not clear at all ; for though the Court talks of its “ concerning the public government and the administration of public justice,” yet that general mode of putting the matter would let in most cases now excluded by the rigorous principles held applicable to a *quo warranto*. Then, again, the case before Lord Hardwicke (r) is certainly not reconcileable with the cases of *The King v. Ramsden* (s), and *The King v. The Aston Union* (t).

The Lord Chancellor framed a question for the Judges, which their Lordships requested time to consider.

the city of *Dublin*, and a judgment having been awarded by the Court thereon, is such judgment, regard being had to the nature of the office, erroneous?" And, in answer to this question, I beg to state that it is the opinion of all the Judges who heard the argument at your Lordships' bar, that such judgment is not erroneous.

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The mode of proceeding by *information*, in the nature of *quo warranto*, came, no doubt, in the place of the ancient writ of *quo warranto*. This writ was brought for property of, or franchises derived from, the Crown. The earliest is to be found in the 9 Richard (*Abbreviatio Placitorum*, p. 21), and is against the incumbent of a church, calling on him to show *quo warranto* he holds the church. Then follow many others, in the time of John, Henry II., and Edward I., for lands, for view of frankpledge, for return of writs, holding of pleas, free warren, plain-age and prisage (*Abbreviatio Brevium*, p. 210; 14 Edw. I.), emendation of assize of bread and beer, pillory, and tumbril, and gallows. Some of these are offices, or in the nature of offices, as in the instances of returns of writs and holding of courts.

The practice of filing informations of this sort by the Attorney General, in lieu of these writs, is very ancient; and in *Coke's Entries* are many precedents of such informations against persons for usurping the same sorts of franchises, as claiming to be a corporation, to have waifs, strays, holding a court leet, court baron, pillory and tumbril, markets, prison, or for usurping a public office, as conservator of the Thames, and coal and corn meter.

It is only in more modern times that informations have been exhibited by the King's coroner and attorney. The first reported case is that of *The King v. Mayor of Hertford* (u), in 10 W. III. And it is a mistake to suppose that these informations were founded on the statute of 9 Anne, *The King v. Gregory* (v), and *The King v.*

(u) 1 Lord Raym. 426.

(v) 4 Term Rep. 240, n.

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Williams (w), where the right to file an information at common law, by the coroner and attorney, against a person for holding a criminal court of record, was recognized.

After the Statute of 4 & 5 W. & M., which restrained the filing of informations by the coroner and attorney, the sanction of the Court was required, and after that statute and the 9 Anne, it exercised a discretion to grant or refuse them to private prosecutors, according to the nature of the case.

It has uniformly done so in cases under the Statute 9 Anne, c. 20, *The King v. Stacey (x)*, and *The King v. Trevenen (y)*, by virtue of the words requiring the leave of the Court. In the case of the bailiff of a court leet, the Court granted leave to file an information expressing, however, a doubt whether the office was of sufficient importance; and in that of a petty constable (z), where the right to elect was in dispute between the inhabitants and the lord of the manor, the Court refused it, saying—“no doubt the King has a right to call any one to account by his writ of *quo warranto* for exercising any public office, be it ever so small; yet we do not use to grant informations in the nature of *quo warranto* for such inferior offices.”

Since the Courts have exercised a discretion under the

On the other hand, those in which informations have been granted, are authorities in favour of their validity. That an information of this nature will lie for offices granted by charter, is a matter beyond dispute; and the authorities are numerous that the same remedy is available against intruders into offices of a public nature, which are supposed to be immediately or mediately derived from the Crown, and existing at common law, though of a very subordinate character: as bailiff of a court leet, *The King v. Bingham* (a); or of a borough, *The King v. Highmore* (b); a constable, *The King v. Goudge* (c), *The King v. Franchard* (d); the steward of a court leet, *The King v. Hulston* (e); and registrar and clerk of a court of requests, *The King v. Hall* (f). The cases of overseers, in which the Court has refused the liberty to proceed in this way, may be possibly explained, on the ground that it did not think fit to interfere with respect to officers whose functions were merely temporary; so also as to churchwardens, *The King v. Dawbeny* (g); though Lord Kenyon expresses his opinion as to the case of the latter, that for such an office an information in the nature of a *quo warranto* would not lie, for that it lay only where the old writ of *quo warranto* could have lain, and that would not lie except for a usurpation on the rights and prerogatives of the Crown, *The King v. Shepherd* (h).

But supposing that this proceeding is applicable only where rights of the Crown, as in the instances of offices derived from the Crown, are concerned, it is not confined to such as are created by charter, or which may be presumed to have been originally so created. It has been held

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| (a) 2 East, 308. | (e) 1 Str. 621. |
| (b) 1 Dowl. & Ryl. 438; | (f) 1 Barn. & Cres. 123. |
| 5 Barn. & Ald. 771. | (g) 2 Str. 1196. |
| (c) 2 Str. 1213. | (h) 4 Term Rep. 381. |
| (d) <i>Id.</i> 1149. | |

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to apply to offices constituted by Parliament; nor can any good reason be assigned why it should lie, where the Crown alone creates the office by its prerogative, and not lie where it creates it with the advice and consent of the Lords and Commons. Accordingly an information has been held to lie for a corporate office created, not by charter, but by act of Parliament; *The King v. The Duke of Bedford and others* (i); so for the office of commissioners for paving under a local act, *The King v. Badcock* (j); and for the office of trustees of a harbour, *The King v. Nicholson* (k), though constituted by a private act, their duties being public; and the Court said, that informations have been constantly granted when any new jurisdiction or public trust is exercised without authority, and the argument that these informations were granted only where the Crown alone could have granted the franchise, was expressly overruled. The answer attempted to be given to the last mentioned case, when cited as an authority in the present, is, that this office concerned the franchise of a port; but this was not satisfactory, for the information was not for the franchise, but for the office, which was clearly created by Parliament, and the reference by the Court to the circumstances of this office concerning a port, is only to show it was a public office.

The more modern authorities are conflicting, informa-

1830, in the case of *The King v. Harley (m)*, Lord *Tenterden*, and *Taunton*, and *Patteson*, Justices, were against granting an information against a trustee for paving and lighting under a private act. Mr. Justice James *Parke* was in favour of it, and the matter was terminated without any judgment being delivered.

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An information was refused against a commissioner of the poor, and for watching, under a local act, by the opinion of *Taunton* and *Patteson*, Justices, who held that the information would not lie, Lord *Denman* doubting, *The King v. Ramsden (n)*; and the same course was followed in *Re The Aston Union (o)*, the Judges there holding themselves bound by the former decision to refuse a *quo warranto* to decide the question of the validity of an election of a guardian of the poor under 4 & 5 Will. IV., c. 76. Whether, in the former case or the latter, the Court decided on the ground that the office was not public in such a sense as to make it the subject of that proceeding, or that, being created by act of Parliament, and not by charter, the remedy by information was improper, we are not told in the short report of the judgment in that case.

On whatever ground these two last cases were decided, we cannot consider them as authorities to establish the position that a *quo warranto* information will not lie for usurping an office created by act of Parliament, when that office is clearly of a public nature. And after the consideration of all the cases and dicta on this subject, the result appears to be, that this proceeding by information in the nature of *quo warranto* will lie for usurping any office, whether created by charter alone, or by the Crown, with the consent of Parliament, provided the office be of a

(m) Referred to by Lord *Denman* in *The King v. Ramsden*, 3 Ad. & El. 463, n.

(n) 3 Ad. & El. 456.

(o) 6 Ad. & El. 785.


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public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and pleasure of others; for, with respect to such an employment, the Court certainly will not interfere, and the information will not properly lie. The case of the Registrar of the *Bedford Level*, *The King v. Corporation of Bedford Level* (*p*), and that of a county treasurer, who is the mere servant of the Justices in *England*, *The King v. Justices of Herefordshire*, (*q*), are instances of this latter sort.

There are then only two questions in respect to this office. Was it public? and was the treasurer a mere servant of the *Dublin* magistrates?

The functions of the treasurer were clearly of a public nature; he was to applot the assessment, receive and hold the money for a time, keep it subject to his order on the bank, pay the expense of public prosecutions, and pay other public monies. It is clearly, therefore, of a public nature, and it is equally clear that, though appointed by the magistrate, he is not removeable at their pleasure, and must, we think, be treated not as their servant, but as an independent officer.

If the Crown had established this office with precisely the same functions, the person filling it being removeable in the same way as an officer of a corporation created by



The *Lord Chancellor*.—My Lords, I entirely agree in the opinion which has been expressed on the part of the learned Judges. Adverting to the provisions of the act of Parliament, I am clearly of opinion that the office of treasurer of the county of the city of *Dublin* is a public office, the officer having important public duties to discharge; and that the office is also of an independent character. It is clear, therefore, that if this office had been created by charter, an information in the nature of a *quo warranto* would have lain for its usurpation. But the matter of doubt and controversy has been, whether, when an office is created, not by charter but by act of Parliament, an information of this kind can be sustained. There is a conflict of authority upon this subject. For my own part, I have long since come to the conclusion that, in this respect, there is no difference between the circumstance of an office being created by charter and being created by act of Parliament. In both cases the assent of the Sovereign is necessary. Whether this is given by charter, or whether it is given by assent to an act of Parliament passed by both branches of the Legislature, I think is altogether immaterial. Recurring, therefore, to the opinion expressed by the learned Judges in reply to your Lordship's question, I move your Lordships to affirm the judgment of the Court below.


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Lord *Brougham*.—My Lords, this case was originally heard before me, when I presided in the absence of my noble and learned friend, and it appeared to be of such importance, and there appeared to be such a considerable conflict of authorities, that I, with the concurrence of my noble and learned friends who assisted me upon the occasion, recommended that it should be argued a second time by one counsel on a side in the presence of the learned Judges, and when my noble and learned friend on the woolsack could attend. It was accordingly so argued. A question

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was put upon the motion of my noble and learned friend to the learned Judges. They have taken time to consider, and they have now given in their very learned and elaborate opinion, in which they all concur, including my excellent and learned friend who was a dissentient upon the subject, but who is satisfied, upon the view of the case now taken, that there is no ground for that opinion. The opinion of my learned friend in so dissenting, had mainly weighed with me in entertaining the doubts which I entertained.

There was also some conflict upon the cases. Those cases have been examined. That you can, upon any view of the subject, or by having recourse to the consideration of the cases altogether, reconcile them, is what I will not take upon me to affirm. I think it is always much better when the Court is laying down a general rule for the future upon a most important question, as this is, if there is a conflict of cases, to admit at once that some cases are one way, the majority of cases being the other way, and to say that the balance of authority is on the side upon which you incline to give your own opinion, rather than to attempt by refinement and subtilty to reconcile cases which in themselves really are in conflict, and are not capable of being reconciled. It is the honestest, it is the fairest, it is the most correct course in such cases.



it is, in favour of the judgment of the Court below—in favour of the defendant in error. I mean, that if there is not this remedy, there really is no other. It is necessary that there should be this remedy, or else a case like the present would be remediless. It must be considered, however, that this judgment is confined entirely to offices of a public nature, and so far of a public nature that they must be of a substantive nature, and that they are independent in their title. Within both those descriptions the present office appears to come, and I do not think it necessary now-a-days to shew, that because a *quo warranto* was formerly only held to lie where there was an usurpation of franchise, or of a royal franchise, or of a matter proceeding from the prerogative of the Crown, therefore, an information in the nature of a *quo warranto*, which, generally speaking, follows the same rule, is to be confined within the same strict rules. I think if you take the whole weight of the authorities, the balance is much in favour of the extension, which this appears to be, beyond that limit. I, therefore, agree with my noble and learned friend, that your Lordships will do well to give judgment for the defendant in error in this case.

Mr. *Fleming* submitted that as this was an information at the relation of a private party, and as this appeal had been brought against the decision of the Court of Queen's Bench and Exchequer Chamber in Ireland, costs ought to be given to the defendant in error.

Lord *Brougham*.—But there is a conflict of cases, and we have thought it necessary to have two arguments.

The judgment was affirmed, without costs.

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 April 8 ;
 May 19, 20 ; CHARLES CULLING SMITH, Esq., and others, *Respondents.*
 June 23, 24.
 1846 :
 May 26 ;
 June 8.
 {
Bequest of
leaseholds.
Remoteness.

A testator being entitled to leasehold premises for terms of years, bequeathed them to trustees, on trust to permit his grandson, B., to take the profits thereof during his life, and after his decease to permit such person, who for the time being would take by descent as heir male of the body of the said B., his grandson, to take the profits thereof until some such person should attain the age of twenty-one years, and then to convey the same to such person so attaining that age, his executors, administrators, and assigns ; but if no such person should live to attain the age of twenty-one, then in trust to permit such person and persons successively, who for the time being would take by descent as heirs male of the body of the testator's son (father of B.), to take the profits of the same leasehold premises until one of them should attain the age of twenty-one, and then to convey the same to such heir male first attaining that age, his executors, administrators, and assigns.

At the death of B., the grandson, his son and heir, A., had attained the age of twenty-one, and entered into possession of the leasehold premises. Upon a bill filed against him by the next of kin of the testator :—

Held that A. had not a good title to the leaseholds ; that the

and *Ireland*, duly made and published his will, dated the 19th of *June*, 1770, and thereby gave and bequeathed his said leasehold lands and premises, and all other chattels, leasehold lands and tenements, which he should die possessed of, to his wife and other persons therein described, their executors and administrators, upon trust out of the yearly rents, issues, and profits thereof, to pay an annuity of 300*l.* a-year to his wife for her life, and subject thereto to pay and apply certain sums yearly for the maintenance and education of the testator's grandson, *Arthur Trevor*, until he attained age ; and after he should attain his age of twenty-one years, subject to the testator's debts, annuities, and legacies, he gave and bequeathed the said leasehold and chattel interests to the trustees, upon the trust, and in the words following :—

“ In trust to permit my said grandson *Arthur Trevor* and his assigns to take the profits of the same leasehold premises for and during the term of his natural life, and from and after his decease to permit such person who for the time being would take by descent as heir male of the body of the said *Arthur Trevor*, my grandson, to take the profits thereof until some such person shall attain the age of twenty-one years, and then to convey the same unto such person so attaining the age of twenty-one years, his executors, administrators, and assigns ; but if no such person shall live to attain the age of twenty-one years, then in trust to permit such person and persons successively who for the time being would take by descent as heirs male of the body of the said *Arthur Trevor*, my son (father of *Arthur* the grandson), to take the profits of the same leasehold premises until one of them shall attain the age of twenty-one years, and then to convey the same to such heir male first attaining that age, his executors, administrators, and assigns ; and if all the persons who shall respectively and successively be heirs male of the body of the said *Arthur Trevor*, my son,

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shall die under the age of twenty-one years, or if there shall not be any heir male of the body of the said *Arthur Trevor*, my son, living at the death of the said *Arthur Trevor*, my grandson, or who shall be afterwards born, then in trust for the only daughter of my said son *Arthur Trevor*, living at his decease, if he shall have but one then living, until he shall attain the age of twenty-one years, or be married, which shall first happen, and then to assign the same to such only daughter, her executors, administrators, and assigns, or in such manner as shall be agreed upon previous to her marriage." Then followed various other trusts to take effect in events which have not happened (a).

The testator subsequently executed several codicils to his will, but they did not in any way affect the bequest in the will of the leasehold interests. He died on the 30th of *January*, 1771, leaving his wife *Anne*, Viscountess *Dungannon*, and two daughters *Anne*, Countess of *Mornington*, and *Penelope Prudence Leslie*, and his said grandson, *Arthur Trevor*, who were his only next of kin, surviving him. The viscountess was barred by her marriage settlement from taking any interest to which she might otherwise be entitled in the personal estate. *Arthur Trevor*, father of the said *Arthur Trevor*, the grandson, was living at the date of the will, but died soon afterwards, in his fa-

ther's (the testator's) lifetime. The will and codicil

same down to the time of his death, having regularly obtained renewals of the leases. By his will, dated the 24th of *August*, 1829, he devised his fee simple estates to the Marquis of *Downshire* and the Earl of *Clare*, upon trust for his eldest son (the appellant) for life, with remainder to his first and other sons in tail; and he gave to the same trustees his leaseholds upon such trusts as, allowing for the different natures of the estates, would best correspond with the trusts of the fee simple estates.

Arthur, the grandson, second Viscount *Dungannon*, died in *Dec.* 1837, and thereupon the appellant, his only child and next of kin, succeeded to the title as the third viscount. Having attained his age of twenty-one years in 1819, he entered immediately after his father's death into possession of the rents and profits of the said leasehold estates bequeathed by the will of the first Lord Viscount *Dungannon*, and continued in the enjoyment thereof. In *June* 1841, he obtained administration, with the will annexed, of the goods and chattels unadministered of the first viscount, and became his personal representative. He also about the same time obtained a conveyance of the legal estate in the devised premises from the administrator of the last surviving trustee of the will.

In *December* 1841, the respondents, as the personal representatives of the said *Anne*, Countess of *Mornington*, and *Penelope Prudence Leslie*, daughters, and two of the next of kin of the first Viscount *Dungannon*, filed their bill in the Court of Chancery in *Ireland* against the appellant and others (who were made defendants for form's sake), charging that the bequest of the leaseholds, in the will of the first viscount was void for remoteness; and that accordingly on the death of *Arthur Trevor*, that testator's grandson (the second viscount), the said leasehold premises became distributable among the next of kin of the said testator; and that the respondents, as personal representatives of two of such next of kin, were entitled to

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two-thirds thereof, the appellant being, as the other next of kin, entitled to the other one-third.

To that bill the appellant put in a general demurrer for want of equity.

The cause was heard before Sir *Michael O'Loughlin*, late Master of the Rolls, who, by an order made in *May* 1842, overruled the demurrer (*b*).

There was an appeal from that decision to Sir *Edward Sugden*, then Lord Chancellor of *Ireland*, who suggested that it would be better for the parties to appeal to this House at once (*c*). This appeal was then presented against the order of the Master of the Rolls.

Mr. *Hodgson* and Mr. *Napier* (of the *Irish* bar) for the appellant (*d*) :—

The question in this case is, whether the trusts declared concerning the leasehold property, by the will of the first Viscount *Dungannon*, to take effect after the death of his grandson, are void for remoteness. Limitations, by executory devise, were not known to the simplicity of our laws. The Duke of *Norfolk's* case was the first of the kind of which we have any report. In Lord *Nottingham's* time such devises did not extend beyond lives in being. Lord *Northington* was inclined to extend them farther :—

(Lord *Brougham*.—In *Cadell v. Palmer* (*e*), we held in

this House, with the assistance of the Judges, that the extreme limit beyond lives in being was a term in gross of twenty-one years and a few months, the period of gestation, where gestation existed).

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The case now before the House is one of first impression. The only case that comes at all near it is that of *Ibbetson v. Ibbetson* (*f*), but it is distinguishable from that also in material circumstances. It must be admitted, however, that that case, as far as it is applicable, is adverse to the appellant, and that the opinions of Lord *Plunket* and Sir *Edward Sugden*, as expressed in the case of *Ker v. Lord Dungannon*, on the same will, are also adverse.

There is no question that the rule, in respect to executory devises, is, that the limitations must be so framed that they *must* take effect, if at all, in twenty-one years and a few months, after a life or lives in being, *Cadell v. Palmer*. That, however, is a harsh rule, and often disappoints the intentions of the testator. But the rule is not broken in upon by the bequest in this case, in such a way as would justify the House to hold the limitations to be entirely void, as the Master of the Rolls did: at the death of the tenant for life, the grandson named in the will, the appellant had attained the age of twenty-one years, and he was also the person who would take by descent, as heir male of the body of the grandson, upon whose death therefore he, answering all the description of the person who was to take the absolute interest in the property, became entitled, under the trusts of the will, to an absolute assignment of the leasehold estates. There is a principle of construction arising out of the rule itself, authorising the holding of the devise to be good, as far as can be, *ut res magis valeat quam pereat*, as in *Forth v. Chapman* (*g*). Any construction that would violate the

· (*f*) 10 Sim. 495; 5 Myl. & C. 96. (*g*) P. Wms. 663.

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rule against perpetuities, cannot be adopted, it is true; but the law does not search for a perpetuity in a will, though it abhors it, when obvious, as nature abhors a *vacuum*. The true rule of construction, according with reason and common sense, requires that the will, being a testator's last disposition of his property, shall be held good, if it does not violate the rules of law. The rule of construction is well laid down by Lord *Lyndhurst*, in the case of *Hoare v. Byng* (*h*), and of the principle on which the rule is founded, there can be no better illustration than what the Master of the Rolls says, in *Markworth v. Hinxman* (*i*), holding that, in a bequest of this nature, the first of the series took the personal estate absolutely. The same rule was laid down by *Littleton*, sect. 586, and by Lord *Coke*, in his Commentary on that section, *Reipublicæ interest suprema hominum testamenta rata haberi* (*k*).

The trusts of this will were, from and after the decease of *Arthur Trevor*, the grandson, who was made tenant for life, "to permit such person who, for the time being, would take by descent as heir male of the body of the said *A. Trevor*, my grandson, to take the profits thereof, until some such person shall attain the age of twenty-one years, and then to convey the same unto such person so attaining the age of twenty-one years, his executors, administrators, and assigns." Upon

rents and profits of the estates. The testator had a clear right to provide for any event that might happen within twenty-one years after the death of the tenant for life ; and here the event provided for happened immediately on the termination of the life estate, so that there was, in fact, no suspension of the vesting of the leaseholds. The person who was to enjoy them was described by the testator, who had a right to describe him, to enable the trustees to convey to him. With respect to the words, "for the time being," is not the plain sense of them to be taken to be, "at the time the event happened," and not from time to time, as the respondents contend? This construction is too plain to require any authority for it. And, as to the third objection, the testator's object was evidently to transmit the property with the title. If the first clause of the will be taken to provide for a succession of persons, the second member of the series must take on the death of the first ; "for the time being" must mean at the death of the first taker. If there was no heir male at the death of *Arthur Trevor*, then there would be an end of the trust ; and, in that event, the next of kin of the testator would certainly take this property. The word "class" would be inaptly applied to persons taking in succession ; and it was a fallacy to apply the term to the series of individuals to take, as pointed out in this will, as the Master of the Rolls in *Ireland* did apply it. To talk of a bequest to a class in this case is a mere sophism, and the case of *Leake v. Robinson* (*l*), which was founded on *Jee v. Audley* (*m*), is no authority for the decision of this case.

This testator had provided for contingencies which never happened, and which would certainly be bad if they had happened. But it is well known that where there are good and invalid bequests in the same will, the good bequests do not fail because by possibility the other be-

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(*l*) 2 Meriv. 363.

(*m*) 1 Cox, 324.

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quests are bad; *Beard v. Westcott (n)*. The law will give effect to good bequests if they arise, but not to invalid bequests whether they arise or not. If the testator had left this property to the person who would be his heir male, to take it at his age of twenty-one years, but if he should not attain that age, then over, could it be said the latter bad bequest would invalidate the first good limitation? Here the first heir male of the body of *Arthur Trevor*, the grandson, attaining twenty-one, would take on his death. That is the first period in the series. The next period is the death of the second heir male under twenty-one. There is a necessary trust for the first heir male of the grandson; on his death there must be an heir male of him, having attained twenty-one. There is a specific trust for the first heir male, and the trustees must hold the rents and profits for him, and while he lives no other person can claim them. Why then should his title be affected by any invalidity in the title of the other members of the series, his own title being complete *in omnibus*. The subsequent void bequests have the same effect as if there were no such bequests at all. The primary trust for *Arthur Trevor* stands in its own strength, is consistent with the intention, and not contravening any rule of law. The subsequent trusts may or may not be void without affecting the primary trust. Why should

decision of Lord *Hardwicke's*, and ought to be governed by the universal law of this country at the time. Was this testator, with all his infirmities of deathbed, to know the law better than Lord *Hardwicke*, who may fairly stand a comparison with Lord *Eldon*, whose observations in the subsequent case of *Trigonwell v. Sydenham* (n), it should be remembered, are at variance with those he made in disapprobation of *Trafford v. Trafford*.

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The late case of *Tollemache v. The Earl of Coventry* (o) in this House, which applies strongly to this case, appears to have been much misunderstood by the Master of the Rolls in *Ireland*, nor did the Lord Chancellor there much relish it. He said, he should abide by it, although it was the decision of only one Judge—which is not the fact, as it appears from Mr. *Bligh's* report that Lord *Lyndhurst* concurred in it (p). Every objection to the appellant's title in this case, might be made to the third Lord *Vere's* in that case, and it is impossible to sustain that decision without admitting the validity of the appellant's title. The cases of *Taylor v. Biddall* (q), *Trafford v. Trafford*, *Trigonwell v. Sydenham*, and *Tollemache v. Earl of Coventry*, and the observations of Lord *Brougham* in *Campbell v. Harding* (r), fully support the appellant's title. There is no case deciding that in a series of limitations, where the first are good and the subsequent bad, the whole series is void *ab initio*; such a case, if it existed, would be a stain on the English law.

The main objection to the appellant's right is made to

(n) 3 Dow, 210, 216.

(o) 2 Clark & F. 611.

(p) The observations ascribed to Lord *Lyndhurst* in Mr. *Bligh's* Report, Vol. 8, p. 567, were not, and could not have been, made by his lordship in the House. He was not present at the argument, nor when the judgment was given on the 15th of August; he was on that day sitting as Judge of Assize at *Lancaster*.

(q) 2 Mod. 289.

(r) 2 Russ. & M. 401.

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rest on the late decision in *Ibbetson v. Ibbetson* (u). Taking that case to be rightly decided, it does not govern this case, because the circumstances are very different; the person there was held entitled to a life interest; he was not held entitled absolutely, nor was the limitation held to be void. An appeal to this House was contemplated, but abandoned, the parties having entered into a compromise. So that this House is not to be governed by that case as an authority against this, in which the House is called on to review all the cases.

The principle of construction applicable to all the cases is, that, if the subject is capable of two constructions, one destroying and the other preserving the bequests, the Court is to adopt the former, as is eloquently expressed by Lord Brougham in *Langston v. Langston* (v); "There are two modes of reading an instrument, where the one destroys and the other preserves. It is the rule of law, and of equity, following the law in this respect, that you should rather lean towards that construction which preserves, than towards that which destroys."

Mr. Turner and Mr. Butt (of the Irish Bar), with whom were Mr. Malins and Mr. Rendall, for the respondents:—

The appellant was not born at the date of the will. The case has been argued for him on three grounds: 1st; That the words "for the time being" mean at the death of the first tenant for life: 2ndly; That if those words do not mean at the time, but "from time to time," as the respondents contend, the disposition is good for the first taker, and the appellant took absolutely: and 3rdly; That the only part of the will that is void, is as to the members of the series who came after the first taker, and the ap

(u) 10 Sim. 495; 5 Myl. & C. 26. (v) 2 Clark & F. 243.

pellant took first and took absolutely. But if the words of the will be attended to, these propositions cannot be maintained.

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First; the express gift of the beneficial interest under the will in the *corpus* of the leaseholds, under the trust to convey as declared by the words, "from and after his decease, to permit such person who, for the time being, would take by descent as heir male of the body of the said *Arthur Trevor*, my grandson, to take the profits thereof, until some such person shall attain the age of twenty-one years, and then to convey the same unto such person so attaining the age of twenty-one years, his executors, administrators, and assigns," is void: for the clear and settled rule of law is, that the validity of an executory bequest must be determined at the testator's death; and that if there be then any possibility of the period of vesting absolutely exceeding the allowed limit, the executory bequest is void: and, according to all the cases, it is void, not in the excess only, but absolutely for the whole: and as the gift under the trust to convey was to the person who should first sustain the double character of being the person who would take by descent as heir male of the body of *Arthur Trevor*, the grandson, and of having attained the age of twenty-one years (the attainment of that age being, in fact, an essential part of the constitution of the character of the person to whom the conveyance is directed, just as essential as the being the person who would take by descent as heir male of the body of *Arthur Trevor*, the grandson); and as the person to take by descent as heir male of the body of *Arthur Trevor*, the grandson, who should first attain the age of twenty-one, might not have attained that age until after the limit allowed for the vesting of executory bequests, so there was a possibility, at the testator's decease, that the period of vesting absolutely might exceed such limit.

Secondly; no gift of the beneficial interest under the

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will, in the *corpus* of the leaseholds, can be implied from the trust of the profits declared in the words of the will before cited. For in order to construe a trust of the profits into a gift of the *corpus*, such trust must be absolute or indefinite; whereas, in the present case, the trust of the profits is neither absolute nor indefinite: on the contrary, by the express terms of the trust, it was not in any one case to exceed a minority; and it was to cease when a person taking under it should first attain the age of twenty-one years: moreover the express gift of the *corpus*, in the direction to convey the leaseholds to the person to take by descent as heir male of the body of *Arthur Trevor*, the grandson, who should first attain the age of twenty-one years, negatives a gift by implication to any individual, who should not sustain the double character of being the person who would take by descent as heir male of the body of the said *Arthur Trevor*, and of having attained the age of twenty-one years; and it is manifest that no person could sustain such double character during the continuance of the trust of the profits. This will is an undisguised attempt to violate the rules of law, seeking to keep the rents and profits distinct from the *corpus* of the estate until the time for vesting of the latter arrived. There cannot be a severance of the rents and profits from the *corpus* of the estate. The latter must go as the former did; *Ibbetson v. Ibbetson*.

Thirdly; this trust of the profits has never arisen, and cannot now arise, since the person, who, at the death of *Arthur Trevor*, the grandson, would have taken by descent as heir male of his body, had then attained the age of twenty-one years.

It is not necessary to trace the origin of the rule governing executory devises, it is admitted that the rule is settled, that an executory devise must vest, if at all, within a life or lives in being, and twenty-one years after,

and, that all which exceeds that limit is void, not only as to the excess, but in *toto*, because it is against the policy of the law to permit property to be taken out of commerce; (per Sir *W. Grant*, in *Leake v. Robinson* (*r*)). And it would introduce uncertainty into the law to hold part of a bequest good and part bad, so that the Courts refuse to split a contingency, as in *Procter v. The Bishop of Bath* (*s*). And for that reason the trust in the case of *Lord Southampton v. Marquess of Hertford* (*t*) was held void in *toto*. Those cases and that of *Marshall v. Holloway* (*u*), followed by the late case of *Ibbetson v. Ibbetson*, which is in all respects applicable to this case, give the respondents the authority of Lord *Eldon*, Sir *W. Grant*, the Vice Chancellor of *England*, and Lord *Cottenham*, and to them may be added Lord *Plunket* (*v*), and Sir *Edward Sugden* in *Ker v. Lord Dungannon*.

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Mr. *Napier* replied.

The following cases, in addition to those before cited, were referred to and discussed on both sides; their application will be seen in the opinions of the Judges, *infra*:

Boraston's Case (*w*), *Hopkins v. Hopkins* (*x*), *Stevens v. Stevens* (*y*), *Vaughan v. Burslem* (*z*), *Jee v. Audley* (*a*), *Doe v. Allen* (*b*), *Doe v. Moore* (*c*), *Griffiths v. Vere* (*d*),

(*r*) 2 Meriv. 363.

(*t*) 2 Ves. & B. 54.

(*s*) 2 H. Blacks. 358.

(*u*) 2 Swanst. 432.

(*v*) It appeared by a short-hand writer's note of his Lordship's judgment in *Ker v. Lord Dungannon* that he was of opinion that the limitation on which the question turned was too remote, but as the parties entitled to two-thirds of the property had not made any case to that effect, he recommended a re-hearing before his successor; and he, with that view, decreed that the bill be dismissed.

(*w*) 3 Co. Rep. 19.

(*a*) 1 Cox, 324.

(*x*) Cas. temp. Talb. 41.

(*b*) 8 Term Rep. 504.

(*y*) Cas. temp. Talb. 232.

(*c*) 14 East, 601.

(*z*) 1 Bro. C. C. 101.

(*d*) 9 Ves. 127.

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The *Lord Chancellor* informed Mr. *Napier* that it was the opinion of all the noble and learned Lords present, that the case was extremely well argued by the learned counsel — by the learned counsel on both sides.

His Lordship then, after conferring with the other Lords, proposed the following question to the learned Judges (who obtained time to consider their answer).

“The testator, being entitled to certain leasehold premises for years, bequeathed the same to trustees, in trust to permit his grandson B. and his assigns to take the profits of the same leasehold premises for and during the term of his natural life, and from and after his decease to permit such person who for the time being would take by descent as heir male of the body of the said B., his grandson, to take the profits thereof until some such person should attain the age of twenty-one years, and then to convey the same unto such person so attaining the age of

age of twenty-one years, then in trust to permit such person and persons successively who for the time being would take by descent as heirs male of the body of his (the testator's) son to take the profits of the same leasehold premises until one of them should attain the age of twenty-one years, and then to convey the same to such heir male first attaining that age, his executors, administrators, or assigns.

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“At the death of B., the grandson, his eldest son A. had attained the age of twenty-one years, and afterwards, with the consent of the trustees, but without that of the next of kin of the testator, articked to sell the said leaseholds to a purchaser.

“Was he (A) capable of making a good title to them?”

The learned Judges attended this day, and as they differed in their opinions, they delivered them *seriatim*.

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Mr. Baron *Platt*.—I think he (A) was not capable of making a good title to the purchaser.

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The testator, in pointing out the object of his bounty expectant on the death of his grandson, describes that object as “such person who for the time being would take by descent as heir male of the body of his grandson,” and directs that such person should be permitted to take the profits until some such person should attain the age of twenty-one years, to whom the trustees were then to convey. If, therefore, the first heir male of the grandson did not attain twenty-one, the period during which the persons who in succession might be heirs male of the body of the grandson for the time being were designed to take the profits, and at the expiration of which the trustees were directed to convey, might extend to half a century. But the rule of law required that the event upon which the estate was to be conveyed to the heir male of the body of the grandson should happen within twenty-one years,

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and the period of gestation next, after the death of the grandson. And when a gift is infected with the vice of its possibly exceeding the prescribed limit, it is at once and altogether void, both at law and in equity. And even if in its actual event it should fall greatly within such limit, yet it is still as absolutely void as if the event, which would have taken it beyond the boundary, had occurred. The case of *Ibbetson v. Ibbetson* (x) appears to me to have been properly decided, and to be directly in point.

For these reasons I think the disposition too remote, and that A. was incapable to make a title to the proposed purchaser.

Mr. Justice *Cresswell*.—As a large majority of the Judges to whom your Lordships' question was proposed are agreed as to the answer to be given to it, I shall state as briefly as possible the reasons upon which my opinion is founded, well knowing that your Lordships will hear the same opinion much better maintained by many of my learned brethren. The question depends upon the effect to be given to the words "and from and after his (the grandson B.'s) decease to permit such person (who for the time being would take by descent as heir male of the body of the said B., his grandson) to take the profits thereof until some such person should attain the age of

should first attain the age of twenty-one years. It is a general rule, too firmly established to be controverted, that an executory devise to be valid must be so framed that the estate devised *must* vest, if at all, within a life or lives in being and twenty-one years after; it is not sufficient that it *may* vest within that period; it must be good in its creation; and unless it is created in such terms that it cannot vest after the expiration of a life or lives in being, and twenty-one years, and the period allowed for gestation, it is not valid, and subsequent events cannot make it so. In *Jee v. Audley (y)*, Lord *Kenyon*, when Master of the Rolls, expressed himself very strongly on this point. He said, "the limitations of personal estate are void unless they necessarily vest (if it all) within a life or lives in being, and twenty-one years, and nine or ten months afterwards. This has been sanctioned by the opinion of Judges of all times, from the time of the Duke of *Norfolk's* case to the present; it is grown reverend by age, and is not now to be broken in upon." Try the bequest under consideration by this rule. At the time when the testator died it was impossible to foresee whether any heir male of his grandson would attain the age of twenty-one in due time, and it might well happen that long after the expiration of twenty-one years from the death of the grandson B., some person would for the first time fill the character of heir male of the body of B., having attained the age of twenty-one years, and so answer the description of the party to take under this bequest. If such an event might happen (and it is self-evident that it might), how can it be said that this bequest is so framed that it must take effect, if it all, within the time limited by law?

It seems to me that the supposed vendor cannot derive any advantage from the bequest of the profits to the

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(y) 1 Cox, 324.

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person who for the time being would take by descent as heir male of the body of B., until some such person should attain the age of twenty-one years. Such bequest appears to be open to the same objections as have been made to the bequest of the *corpus* of the estate; and if it were not so, A. never answered the description of a party to take under it; and for the purpose of the question proposed by your Lordships, I think the case must be considered as if the intermediate profits had been given to a stranger. The main argument urged at your Lordships' bar in favour of A.'s title was, that if he took under this bequest he would of necessity take in due time, and therefore it was good as to him, although void as to those who might take at a more remote period. The question, however, is not (as I apprehend) whether A. or B., if he took, must take in due time, but whether the estate, if taken by any one under this bequest, must be taken in due time. It is but one bequest, whoever takes under it; and I find no authority for saying that it can be good as to one and bad as to another. In *Leake v. Robinson* (z), *Lord Southampton v. The Marquis of Hertford* (a), and *Ware v. Polhill* (b), the doctrine, that an executory devise, too remote as to some persons who would take under it, is altogether void, was propounded as a matter beyond all dispute. Upon these cases it was observed in argument, that they clearly related to classes, and that, if the whole class could not take, no part of it could; but that the bequest in question is in favour of an individual, and not a class. It is not, however, in favour of any particular individual; there might be several persons in succession filling the character of heir male of the body of B., the grandson; and the testator gave no preference to any one of them over the others, simply as heir male of the body, but preferred him who should first attain the age of twenty-one.

(z) 2 Mer. 363.

(b) 11 Ves. 257.

(a) 2 V. & B. 54.

This bequest then was in favour of one of a class, it being quite uncertain who that would be, or when he would be ascertained. I apprehend, therefore, that the cases of *Leake v. Robinson*, and *Lord Southampton v. The Marquis of Hertford*, and *Ware v. Polhill*, are authorities for our guidance in answering your Lordships' question in this case. This point may be further illustrated by Mr. *Fearne's* chapter on executory estates limited upon a failure of heirs or issue, sect. 14: "Upon the distinction between a dying without issue generally, and a failure of issue confined to the period of a life in being, it seems to follow, that though an executory devise in tail or in fee to one in *esse*, after a dying without issue, is void, yet an executory devise for life to one in *esse*, to take place after a dying without issue, may be good, because in the latter case the future limitation being only for life of one in *esse*, it must necessarily take place during that life, or not at all."

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In the first case put by Mr. *Fearne*, it would have been bad even had the first devisee died without issue in the lifetime of the person to whom the executory devise was limited; although in the event which happened, the estate would vest in due time; but that might not have been the case; and the person named who was to take in fee or in tail could not be separated from his descendants, and no distinction could be made in his favour; although, if he individually took under the devise, he must of necessity take in due time.

The case of *Trafford v. Trafford* (c) is supposed to be an authority in favour of the validity of this bequest. But the point now under consideration does not appear to have been presented in argument, nor indeed was it the interest of either of the litigant parties to contend that the bequest was altogether void, and therefore Lord *Hard-*

(c) 3 Atk. 347.

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wicke can hardly be assumed to have pronounced any judgment upon it; and even if he had done so, the authority of the case must have been considered as much diminished by the observations made upon it by Lord *Eldon*, in the case of the *Countess of Lincoln v. The Duke of Newcastle* (d). The case of *Tollemache v. Lord Coventry* (e) is a strong authority for answering your Lordships' question in the negative. The original decision was in favour of the fourth Lord *Vere*, on whose behalf the bill was filed. On appeal that decree was reversed; and as the litigant parties were the representatives of the third and fourth Lords *Vere*, that has often been treated as a decision that the third Lord *Vere* would take under the will. But that is not so. The whole of the reasoning of Lord *Brougham* shows, that the executory bequest, after the death of the second Lord *Vere*, was void, because it possibly might not vest in due time. The decision, therefore, must be taken to have been, not that the bequest was good as to the third Lord *Vere*, but that it was bad as to the fourth; and the reasoning upon which that decision was founded is strictly applicable to the present case.

I now come to the case of *Ibbetson v. Ibbetson* (f), which is expressly in point. There Sir *H. C. Ibbetson* devised his reversion in certain estates to the use of his

house under or by virtue of the settlement made upon his marriage, or of the limitations contained in his will, *until* a tenant in tail of the age of twenty-one years should be in possession of his mansion-house, and then the plate, pictures, &c., were to go and belong to such tenant in tail. The Vice Chancellor of *England* held that the devise was void; and that decree was on appeal affirmed by Lord *Cottenham* (g).

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Upon the whole, then, it appears to me, that the general rule by which executory devises are to be judged of, and express authority equally call upon me to say, in answer to your Lordships' question, that A., the eldest son of the grandson B., was not, without the concurrence of the next of kin of the testator, capable of making a good title to the leaseholds which he articulated to sell.

Mr. Justice *Wightman*.—In answer to the question proposed by your Lordships, my opinion is, that A. was not capable of making a good title to the leaseholds.

The bequest of the leasehold estate is an executory devise, which it is now settled can only be good, if it must *of necessity* take effect within the compass of a life or lives in being and twenty-one years, and the period allowed for gestation afterwards. Whatever uncertainty upon this point may have existed previous to the determination of the case of *Cadell v. Palmer* (h), the rule may since that case be considered settled; and the question is, whether the bequest in the present case is good as an executory devise within that rule.

A will of personalty takes effect from the time of the testator's death; and if circumstances, extrinsic of the will itself, are to be considered at all, they must be those existing at that time. When the testator died, B., the grandson, was under age, and unmarried; there was no

(g) 5 Mylne & C. 26.

(h) 1 Clark & Fin. 372.

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heir male of his body, and it might be that there never would be one.

The devise is, “to permit my said grandson B. and his assigns to take the profits of the premises for the term of his natural life, and from and after his decease to permit such person who for the time being would take by descent as heir male of the body of my said grandson, to take the profits thereof until some such person shall attain the age of twenty-one years, and *then* to convey the same unto such person so attaining the age of twenty-one years, his executors, administrators, and assigns.” The person claiming the leasehold estate itself under this devise, and a conveyance of it from the trustees after the death of B., the grandson, must fulfil the double contingency of being heir male of his body, and attaining twenty-one years of age. There might be a long succession of heirs male of the body of B., not one of whom could claim as devisee of the leasehold, and entitled to a conveyance of it, as no one of the class, if they may be called so, might attain the age of twenty-one years. At the time of the death of the testator, therefore, there was no certainty that the devise of the leasehold would take effect within the period allowed by the rule.

But it is said, that, looking at the terms of the will, and particularly at the provision for the disposal of the

struction, nor indicate such an intention on the part of the testator, as that suggested. On the contrary, it appears to me that there is but one devise, and that the testator, either not knowing or not regarding the rule against perpetuities, has devised and intended to devise the premises in question, not to the person who should be heir of the body of B. at the time of his death, but to the first of a class who should be such heir, and twenty-one years of age, with a trust for *interim* rents and profits until such devise could take effect. The provision as to *interim* profits is wholly dependent upon the devise of the leasehold itself, and must stand or fall with it. If that be void, the provision for intermediate profits fails also.

It seems to me that there is a fallacy in assuming, that if there was an heir male at the death of the grandson, he would be, at all events, entitled to take something,—either the rents and profits if under age, or the leasehold itself if twenty-one years of age. The case must be considered as it stood at the time of the death of the testator. When he died it was *uncertain* whether, if there was an heir male at the death of the grandson, he would take any thing; for if twenty-one, he would not be entitled to the rents and profits by the terms of the will, nor would he be entitled to the leasehold itself by reason of the rule against remoteness, which rendered the devise void *ab initio*; and this state of things actually has occurred, A., the heir male of the grandson, being more than twenty-one when the latter died.

It was also said, that the devise might be divided into two parts, and that one of such parts was a devise to the particular person who happened at the death of B., the grandson, to be heir male of his body, and the other a bequest or rather series of bequests over in the event of his dying before he attained twenty-one; and that A., who happened upon the death of B. to fulfil both the requisites of the will, being heir male and twenty-one

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years of age, would be entitled as a devisee individually designated by the testator, though the subsequent limitations might be void. There is, however, as it seems to me, this objection to such a view of the case, that A.'s son or grandson, or any other person who happened to be the heir male of the body of B. at the time of his death, would be as well designated as A. himself; and though a person answering a certain description was to take, it was quite uncertain at the testator's death who that person would be, and whether there would be any such within the limits of the rule. The testator does not point to any person who must of necessity be in existence within those limits.

A great many cases were cited upon the argument, to which I do not think it necessary to refer, as this is rather a question of construction and intention than of authority. The principles upon which those cases were founded were not doubted, so much as their applicability from their being more or less distinguishable in circumstances from the present. All the most important of them are referred to and commented upon in the judgment of the Master of the Rolls. But there is one case so directly in point that I cannot but refer to it, for it seems to me that unless that case be overruled the judgment now in question must be affirmed; I allude to the case of *Ibbetson v. Ibbetson* (i), decided after elaborate argument by the Vice Chancellor

eminent judges before whom it came, that the limitation over after the death of the tenant for life was void for remoteness. I may also observe, that when the devise now in question came before the Lord Chancellor of *Ireland* in the case of *Ker v. Lord Dungannon* (j) his opinion appeared to be against the validity of the devise, though it did not become necessary for him to give any express decision upon the point.

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Upon the whole, therefore, I am of opinion, both upon general principles and express decision, that the devise under which A. claims is void for remoteness, and that he is not capable of making a good title to the leaseholds.

Mr. Baron *Rolfe*.—In answer to the question put by your Lordships in this case, I have to state as my opinion, that the eldest son of B., the grandson of the testator, cannot, under the circumstances, make a good title to the leaseholds in question. My opinion is founded on what I consider to be an undisputed rule of law, namely, that an executory bequest is bad, unless it be clear, at the death of the testator, that it must of necessity vest in some one, if at all, within a life in being and twenty-one years afterwards. In the case propounded by your Lordships it would be impossible to say, at the death of the testator, that the leaseholds bequeathed by his will must necessarily vest, if at all, within that period; and so the whole gift is, in my opinion, void for remoteness.

In order to take the case in question out of the operation of the general rule, it has been contended, that on the special frame of the bequest a distinction arises. Here the gift is to trustees upon trust for B., the grandson, for his life, and after his decease upon trust to permit the person, who for the time being would take by descent as heir male of the body of B., the grandson, to take the

(j) 1 Dru. & War. 509.

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profits until *some such person* shall attain the age of twenty-one years, and then to convey to such person. Such being the terms of the will, the argument on the part of the appellant is this:—Unless at the testator's decease there is some one answering the description of heir male of the body of B., the bequest wholly fails, and no question arises as to its construction. It must, therefore, in arguing the case, be assumed that such an heir male will exist. If there be such a person, he, it is said, must, on the death of B., have an immediate vested right to the rents and profits during his minority, (supposing him to be a minor,) with a right to call for an assignment of the *corpus* of the estate on his attaining twenty-one; or, if he be not a minor, then he must, according to the will, have an immediate right to call for an assignment. In either case his interest must vest, it is said, at or within twenty-one years after the death of B. So that, as to him, the rule against perpetuities will not be violated, whatever may be the case of subsequent claimants. He is (it is contended) the first of a series, any one of whom may, according to the intention of the testator, be the party ultimately entitled to call for an assignment of the property. And though, if he should die before he should attain a vested interest, those who are later in the series may be shut out on the ground of remoteness; yet that, it is said, is no reason for excluding him who, if he takes at all, must take within the prescribed period.

This is, as I understand it, the argument on the part of the appellant; but it appears to me to rest on no solid foundation. In the first place, the gift of rents and profits during the minority appears to me to make no difference in the case. A devise of rents and profits, no doubt, is generally the same thing as a devise of the *corpus*; it is a devise of all which makes the *corpus* valuable, and *primâ facie* draws the *corpus* with it. But,

on the other hand, it is competent to a testator to make, within certain limits, a temporary severance of the rents and profits from the *corpus*, and to enable any object of his bounty to call for the former, though he may not be entitled to the latter; and that has clearly been done by the testator in the present case. He has in effect directed his trustees to retain the *corpus* in their own hands until some person answering the description of heir male of the body of B. shall attain his age of twenty-one, and then, but not till then, to assign the *corpus* to that person. What may have been the disposition of the rents and profits in the meantime, appears to me quite unimportant. Even though the same person should, under the limitations of the will, take first the rents and profits during minority, and afterwards the *corpus* on attaining twenty-one, yet he will take them as distinct bequests. He will not become entitled to the *corpus*, because he has previously enjoyed the rents and profits, nor will he originally take the rents and profits, because he is the person who will eventually become entitled to the *corpus*. It may be that the same person may first fill the character which entitles him to the rents, and afterwards that which entitles him to the *corpus*. But this is an accident; it is not the result of any necessary connection between the two gifts. And I am therefore of opinion, that the will must be construed in the same way as if the rents and profits accruing between the testator's decease and the time when some one shall be entitled to call for an assignment of the *corpus* had been given to strangers, or had been undisposed of.

This being so, the question is, whether the appellant can successfully withdraw his case from the operation of the rule against perpetuities, by showing that, so far as he is concerned, that rule certainly will not be violated, inasmuch as his interest must take effect in possession, if at all, within twenty-one years after the death of B. I

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apprehend that this is not material, and that the rule applies to the first heir male as well as to all others. There is no gift to him in terms different from the gift to all others who may be able to bring themselves within the terms of the gift. The person who shall be heir male at the death of the tenant for life was intended by the testator to take at twenty-one, not because he would stand in any category different from that in which the succeeding heirs male would stand, but because he would stand in the same. The testator intended that the first heir male who should attain twenty-one should take, whether he should be the heir male at the death of B., or not. And where a testator has made a general bequest, embracing a great number of possible objects, there is no authority for holding that a Court can so mould it as to say that it is divisible into two classes, the one embracing the lawful, and the other the unlawful objects of his bounty.

It is perfectly true that the general language of the testator embraces exactly the same objects as if he had in terms directed his trustees to assign to the person who at the death of B. should be heir male of his body, if such person should attain his age of twenty-one, and if not, then to the first subsequent heir male who should attain twenty-one; and there is no doubt but that such a gift would be good as to the person who should be heir male of B. at his death. It would be good, because at the death of the testator it would be absolutely certain that the bequest must take effect, if at all, within twenty-one years after the death of B.; and it would not be rendered invalid by a subsequent gift to others, which might be too remote.

Though, however, the general language used by this testator necessarily includes that which, if it had stood as a distinct gift, would have been good, yet, including, as his language certainly does, gifts too remote as well as those not too remote, the whole is bad, for the gift is *one*

entire gift ; and it is impossible to say of it, in all its different contingencies, that it must have effect within the prescribed time. It has been contended that, in applying this doctrine to the present case, we are unwarrantably adopting principles from the cases of gifts to classes of persons, such as children, brothers, or the like, and which have not been and ought not to be applied to a case where there is no gift to a class to take together, but rather several gifts to a series of persons who are to take in succession one after the other. There does not appear to me to be any ground for this distinction. The reason why a gift to a class, as children or the like, is void when it may embrace some objects too remote, is this :—there is no intention to give to any number short of the whole class ; and, therefore, if the prescribed limit *may* be transgressed before the class is filled up, the whole gift fails, because it does not necessarily take effect within the prescribed period. The ground on which the gift fails is, the want of certainty that the bequest will take effect within the prescribed period ; and whether such uncertainty arises from the possibility of the birth of further children, or from any other cause, seems on principle immaterial. In the case of a gift to a class, just as in the present case, there will be many events in which the bequest might be upheld, if the Courts might do what is here proposed, namely, separate the gift into two or more parts, on the ground that such parts are necessarily included in the general words used by the testator. In *Jee v. Audley* (*k*), the testator gave 1,000*l.*, upon a general failure of issue of *Mary Hall*, to the daughters *who* should *then* be living of *John Jee* and *Elizabeth* his wife. At the testator's decease *Jee* and his wife were above seventy years old, and they had four daughters then living. The four daughters filed a bill to secure the fund,

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but Lord *Kenyon* dismissed it, on the ground that the gift was void, as it would include after-born children of *Joe* and his wife, and so would not necessarily vest during a life in being, and twenty-one years afterwards. Now, if in any case the Court could be warranted in dividing a general bequest into its necessarily component parts, it would not have been that case, where it is quite clear, from the age of the parties, that the testator never had in his contemplation any daughters except the four already born. And if the bequest had been, on the death without issue of *Mary Hall*, to such of the daughters as should then be living, if no other daughter should then have been born, but if any other daughter should then have been born, to each of all the daughters of *Joe* and his wife, born and to be born before the failure of issue of *Mary Hall*, as should then be living, the bequest in favour of the four would have been perfectly good, in the event of no other daughter having been born. But no one ever suggested that the Court could mould the words of the bequest, so as to divide it, as it were, into what was and what was not lawful, though by such a course it would have introduced nothing into the gift, which was not necessarily included in the words used by the testator.

Where a testator has made one entire gift, under which no one can claim except by showing that he fills a particular character, which character it may be possible that no one will fill within the prescribed period, there the whole is void; and it is not material that the testator might have attained his object, as to some of those he meant to benefit, by splitting his gifts into different parts. If the testator had done so, those who would take, would take not because they fill the character designated in the general bequest, but because they fill some other character, or fill the general character with some other superadded qualification or restriction necessarily, confining the period of vesting to a life in being, and twenty-

one years afterwards. It is on these short grounds, that I have come to the conclusion that a good title cannot be made by the grandson's son, A., to these leaseholds.

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I will only add, that I have formed my opinion without reference to the case of *Ibbetson v. Ibbetson*, decided first by his Honour the Vice Chancellor of *England*, and afterwards affirmed by Lord *Cottenham*. Their decision in that case, almost in terms, governs the present. But it was suggested in the course of the argument at your Lordships' bar, that *Ibbetson v. Ibbetson* was a case of recent date, not brought by appeal to this House, and which, therefore, never received the sanction of the highest Court of Appeal; and it was said, therefore, to be a decision which ought not to bind your Lordships. Although I should feel great difficulty in acceding to the doctrine, that nothing is to be deemed as established law which has not been decided by the ultimate Court of Appeal, yet I have thought it better to found my opinion in this case on the general principles applicable to cases of this nature, rather than rest it on the authority of *Ibbetson v. Ibbetson*, however correctly that case may have been, and, in my opinion, was decided.

Mr. Justice *Maule*.—I am of opinion that A. was not capable of making a good title, because the bequest under which he claims is void from being too remote. That bequest is to take effect upon "some person who would take by descent as heir male of the body of B., attaining the age of twenty-one years;" and the question is, whether at the death of the testator it was certain that this event would happen within the time allowed by law, that is twenty-one years after lives in being, with some months for gestation, if necessary. Now it might well happen that by the successive marriages and deaths under twenty-one of heirs male of the body of B., or (without supposing any marriage under twenty-one) by the character of heir

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male of the body of B. being successively filled by minor descendants of different sons of B., the existence of an heir male of the body of B. who should be twenty years of age might happen for the first time long after time limited by law; and it appears to me necessarily follow from this that the gift is too remote. It will make any difference in this conclusion that the event which the testator gives the right to have the leasehold conveyed might arise, and, in the case put, has arisen within the limited time, it being well settled, and undisputed at the bar, that an event which may happen within, but may also happen beyond the legal limit is too remote.

There can be no doubt if no rule as to perpetuities were in existence, a claimant who attained the character of male of the age of twenty-one, long after the time beyond which, as the law now is, his claim would be barred, would be entitled to the leaseholds in question under the very words of which the construction is the object of inquiry; and the existence of the rule as to perpetuities is certainly no reason for altering the construction of the bequest.

It was contended at your Lordships' bar that the meaning of the testator would be best understood by reading his will, as if the gift to the trustees had been to persons

limitations in favour of unborn heirs male, which might be void from remoteness.

With respect to this argument it may be observed that the words of the testator are clear and unambiguous: there is no difficulty in dealing with them as they stand in the will, unless it be sought to evade the rule against perpetuity. There is no such rule of construction as that any words which point out the same course of devolution as those used by the testator may, in construing a will, be substituted for those which he has used,—a proposition which seems to be assumed in the argument in question. Such a rule would be manifestly inconsistent with the established law, that a gift to take effect on an event which may happen or may not happen within the legal limit is too remote, such a gift being always capable (consistently with the same order of devolution) of being divided into two gifts, one necessarily to take effect, if at all, within the legal time, and the other afterwards.

The proposed construction unites into one the gift of the rents and profits and the gift of the leaseholds themselves, which the testator had separated, and divides into many the gift of the leaseholds, upon some heir male attaining twenty-one, to such person so attaining that age, which is clearly expressed by the testator as one single undivided gift. The circumstance of the rents and profits being given to the minor heir immediately on the death of the grandson, does not appear to me at all to affect the gift of the leaseholds themselves; the gift to the series of minor heirs is in terms perfectly distinct from that to the person who is to take the leaseholds as an heir having attained twenty-one. The gift of the leaseholds might carry them to a person who had never belonged to the series of minor heirs, as in the case of a younger son of a grandson, or a descendant of a younger son, who might be of full age, on the failure of a succession of minor heirs descended from his elder brothers, and who might

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be related to them in any assignable degree of remoteness of consanguinity. The right to the leaseholds is wholly independent of the gift of the rents and profits having taken effect either in favour of the claimant of the leaseholds, or any other person. Indeed, the claim of A. (which appears to me in this respect liable to no objection) is founded on the assumption that an heir of full age, who has never been an heir under age, and though there has never been any heir under age, would be entitled to the leaseholds.

No cases were cited at your Lordships' bar which appear to me in any degree inconsistent with the view I have submitted, except those of *Taylor v. Biddal* (l), and *Trafford v. Trafford* (m), in which it was insisted that dispositions were held good, which would be too remote unless the present claim to the leaseholds is well founded. But the question was never raised in either of these cases; and I think it is quite clear that it was not considered by the Court in deciding either of them. The observation which, in the case of *Lady Lincoln v. The Duke of Newcastle*, Lord Eldon made on the case of *Trafford v. Trafford*, appears to me, notwithstanding what was suggested with respect to its authority in the argument at the bar, to be entitled to all the weight due to a well-considered and cautiously expressed opinion of that great master of the law of real property.

The weight of later authority is decidedly in favour of a negative answer to your Lordships' question. It appears to me that the case of *Ibbetson v. Ibbetson* was well decided, and is in point in support of the opinion which I have ventured to express.

Mr. Justice Coltman.—The answer which ought, I think, to be returned to the question proposed by your

(l) 2 Mod. 289.

(m) 3 Atk. 347.

Lordships, is, that A. is not capable of making a good title to the premises in question.

It does not, I think, admit of a doubt if the estate had been bequeathed to trustees after the death of B., in trust to permit J. S., his executors and administrators, to receive the rents, until some person who for the time being should be heir male of the body of B., should attain the age of twenty-one, and upon the happening of that event to convey the estate to such heir male; that in such case, if B. survived the testator, the gift to such heir male would be void, on the ground that an executory bequest cannot be good unless the contingency on which it depends, if it happens at all, must happen within a life or lives in being, and twenty-one years.

It might, indeed, be contended in the case supposed, that such a bequest is capable of being subdivided into a number of successive limitations, and of being read as if the trusts had been, after the death of B., to permit J. S. to take rents until the person who should then be heir male of the body of B. should attain the age of twenty-one, and on his attaining that age then to convey the estate to such heir male, but if he should happen to die under twenty-one, then in trust to permit J. S. to receive the rents and profits until the person who should then be heir male of the body of B. should attain the age of twenty-one, and then to convey the estate to him, and so on; and it might be contended that the limitation to the first heir, who was clearly intended to take, if at that time he was of the age of twenty-one, would be good, though that to the second would be bad.

But the answer to this reasoning is, that the testator, in the case supposed, could not be considered to have framed such a limitation as the argument supposes. The expressions of the bequest import one single gift to one person answering a particular description; namely, a person who is heir of the body, and of the age of twenty-

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one; and the intention plainly indicated by the words is, that the vesting of the estate is to remain suspended until some person who fills both parts of the description is in a capacity to take; and as by possibility the contingency on which the limitation depends may not happen till after the time limited by law, the devise is void. It was said by *Sir W. Grant*, in the case of *Leake v. Robinson* (n), "Perhaps it might have been as well if the Courts had originally held an executory devise transgressing the allowed limits void only for the excess, where the excess could be clearly ascertained; but the law is otherwise settled." And it is, I think, impossible to read Lord *Eldon's* judgment in the case of *Lady Lincoln v. The Duke of Newcastle* (o), without coming to the conclusion, that his opinion as to the invalidity of such a bequest as above supposed, was fixed and settled; and accordingly Lord *Cottenham*, in the case of *Ibbetson v. Ibbetson* (p), speaks of such a bequest as being clearly too remote.

But it may be said that the present case is different; for, in the question put by your Lordships, the persons to whom the profits are given during minority, are the same persons to whom the chance of succeeding to the corpus of the estate is intended to be given. In this case it may be said the intention of the testator clearly is, that the individual filling the character of heir of the body of B., should take a benefit under his will; he is a person who, if he ever exists, must exist at that time; that his position differs from that of every other person whom the testator may be supposed to have had in his contemplation; that he is a person specially designated and intended to take something, and to take it in all events, whilst, with regard to all but him, the testator must have contemplated the possibility that they might never take

(n) 2 Meriv. 263.
 (o) 12 Ves. 232.

(p) 5 Myl. & C. 26.

anything. Now what, it may be said, did the testator intend that he should take? Did he not intend him to take, immediately on the death of B., the profits, if a minor, the *corpus* of the estate, if of age. Be he major, or be he minor, it may be said that he takes the bequest immediately, and consequently within the time allowed by law.

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Still it seems to me that the difficulty remains as before. The gift of the profits during minority is a distinct bequest from the gift of the *corpus* of the estate; the party who takes must take under one of these branches, separately considered, and apart from the other. The testator did not intend the first heir (as such) to take the *corpus* of the estate, but such person only as should first answer a particular description. Whether the first heir or some other person would do so was, at the testator's death, quite uncertain. The vesting of the estate was intended to be suspended till some such person should be in a capacity to take. Disguise the matter as we may, the *corpus* of the estate can only be given to the first heir by subdividing the limitation into a series of successive limitations, as in the case first supposed; and such a subdivision, I think, on the grounds before stated, to be unwarrantable.

It is true that in the present case A. did answer the entire description at the time of B.'s death; but that was a mere accident. It was quite possible at the testator's death that neither A. nor any other person might have answered the description for a century; and therefore, on the grounds above detailed, I think the limitation cannot be sustained. The case, in effect, cannot, in my humble opinion, be distinguished from that of *Ibbetson v. Ibbetson* (q), and I am unable to see any solid ground for dissenting from that case.

(q) 10 Sim. 495; 5 Myl. & C. 26.

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Mr. Justice *Williams*.—If the only question in this case had been what was the intention of the testator,—that is to say, if he had been asked at the time of making his will, whether the person designated as A. in your Lordships' question, should, under the circumstances which have actually occurred, take the property upon the decease of his grandson B.,—my opinion is, though some doubts have been expressed to the contrary, that he would, without hesitation, have answered in the affirmative. But there is another question in this, and all other cases of the same description, which, whether it be deemed first or second in order, is of equal importance; and that is, whether the intention of the testator, if ascertained, can be carried into effect consistently with the known rules of law; the rule of law applicable to this case having been fully admitted, throughout the whole discussion, to be perfectly settled, as it certainly is; *Cadell v. Palmer* (r). Upon this the difficulty has arisen: and it may be as well, perhaps, to state, at the commencement of the few remarks with which I shall trouble your Lordships, that although the question may be open for the decision of this House, and is one of great importance generally, as well as in the particular case, I cannot help considering that question as settled by authority.

It is true that the case of *Ker v. Lord Dugannon* (s) having been appealed against, and also decided upon another ground, cannot, for that reason, be quoted as a direct authority, and is to be considered only of so much weight as the reasoning of the Lord Chancellor of Ireland in giving judgment may entitle it to; and that the case of *Ibbetson v. Ibbetson* (t), when before the Vice Chancellor, is open partly to the same remark, because, as has been observed by Sir *Edward Sugden*, that was not decided upon the point now under consideration; but to the

(r) 1 Clark & Fin. 372.

(s) 1 Dru. & Warr. 509.

(t) 10 Sim. 495; 5 Myl. &

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decision of the Lord Chancellor, when that case came before him upon appeal, no such observation applies; the principle which bears so strongly upon the present was by him expressly recognized and distinctly acted upon. The question, therefore, as it seems to me, mainly is, whether there be any substantial distinction between this case and that of *Ibbetson v. Ibbetson*, so decided by his Lordship.

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Before, however, I pursue that inquiry, I will briefly notice what, as I understand it, is agreed on all hands to be the real state of the question; and, ample as has been the discussion and the citation of cases before your Lordships, that question seems to lie in a comparatively narrow compass.

Now it is, I believe, admitted, or rather was assumed as a principle throughout the argument, "that the validity of the gift must be determined by considering how it stood at the death of the testator;" and if, under the terms of the will, an indefinite period of time might elapse before a tenant in tail of the requisite description (that is, a tenant in tail who attained the age of twenty-one), existed, it matters not that *in fact* such tenant in tail has existed in the person of A. So the question is expressly stated by the Lord Chancellor of *Ireland*, and by the Vice Chancellor and the Lord Chancellor of *England*; and I may add, that it was so stated by the counsel on both sides at your Lordships' bar. And to show that it could not have been stated otherwise, I may observe, in the language of Lord *Brougham* in the case of *Tollemache v. Coventry* (u), that "it does not follow, because you are wise after the event, that therefore you are to put a construction upon the instrument, which you have no right to do, to meet that which has accidentally happened after the date of the instrument;" or, in other words, the question is not what *may* happen, but what

(u) 2 Clark & Fin. 611.

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must happen. It comes therefore to this: What is the true construction of the clause of the will proposed by your Lordships to us for our consideration, understanding the question to be as just stated? That clause is as follows. [The learned Judge read it, as in p. 547, *ante*, and proceeded.] Is then this a gift to a particular person, who is designated, and *must* take upon the death of B., the grandson, or is it general,—a part of the description being, that the person to take *must* attain the age of twenty-one, and as much a part of that description as that he *must* be a tenant in tail. The clause is, to say no more, capable of this latter construction; and the authority to which I have referred as in a good degree influencing my opinion, shows that this *ought* to be the construction. But, independent of all authority, it seems to me clear that A. is no more pointed out, in certain, than his son or grandson, and so forth, *seriatim*, indefinitely, till some person shall appear who answers the full description of being tenant in tail, and also of the age of twenty-one.

The clause of the will upon which the question in the case of *Ibbetson v. Ibbetson* arose is as follows: [Having read the clause, and referred to the Vice Chancellor's judgment on it, the learned Judge proceeded.] To the decision of the Lord Chancellor, when the case came before him upon appeal, I must refer with some particularity, though I am enabled to do it very briefly. "The claim (says his Lordship) under the gift to the first tenant in tail of the age of twenty-one who should be in possession of the testator's mansion house, is clearly too remote. There might be successive tenancies in tail taking for any number of years without any one tenant in tail in possession attaining twenty-one; and as the estate could not remain suspended if the contingency should not happen within the period limited by the rule of law, so the possibility of such contingency not happening within the limited period renders the gift void, though the contin-

gency has in fact happened within that period ;” and the appeal was accordingly dismissed with costs. So that the two points which have so important a bearing upon the present case were expressly decided : first, that the possibility of the contingency not happening within the allowed period makes the gift void ; and next, that the contingency *in fact* happening within that period makes no difference. It is, therefore, (unless the cases can be distinguished,) a precise decision upon the present question.

Then are the cases distinguishable ? Upon comparing the language, which is almost, *ipsissimis verbis*, identical, the objection of remoteness seems to me to depend upon precisely the same circumstances,—the uncertain and indefinite period which may elapse before the requisites of there being a tenant in tail and his attaining twenty-one concur. The provision in this respect is the same in each, and the objection depending upon it. Sir *E. Sugden* has expressly declared his opinion to be, that the cases cannot be distinguished (*v*) ; and, upon the best attention which I can bestow upon the subject, I am unable to suggest any distinction.

Before I conclude, I cannot avoid remarking, that although, for the reasons already assigned, it cannot, perhaps, be considered that this case has been decided by the Lord Chancellor of *Ireland*, or that of *Ibbetson v. Ibbetson* by the Vice Chancellor of England, yet the reasoning in both cases, and the full and ample discussion of this very case by Sir *E. Sugden*, and the clear opinion expressed by him as the result of that discussion, must be deemed a powerful accession (if any be required) to the authority of the Lord Chancellor in the case of *Ibbetson v. Ibbetson*, from which, as I have just observed, I cannot distinguish the present. The result of all these considera-

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(*v*) See 1 Dru. & War. 538.

seems to me that no difficulty of law arises in apprehending that, in order to arrive at the true intent of the will, it must be taken to speak as from the mouth of the testator, and be construed without reference to any rule of law respecting remoteness; that is, in such a manner as to give effect to the intention of the testator, and for the sole purpose of ascertaining the testator's meaning. Now, looking at the words of the will, they appear to me very plain that what the testator intended was this: That on the death of his grandson, the profits of the estate should be permitted to the person, who at that time was the heir male of the body of that grandson, to take the profits till he attained twenty-one years of age; but if he died under twenty-one, then the profits should be permitted to the person, who at his death was the heir male of the body of the grandson, to take the profits till twenty-one, and then to continue to the next person who answered the same description, and so *toties quoties* to the heirs male of the body of the grandson, each of the heirs male of the body of the grandson, in the same manner. Now if the will had been drawn out *in extenso* in such or the like language, .

veyed to him at all, it must be within twenty-one years of the death of the grandson; and the subsequent limitations, though void for remoteness in themselves, and destructive, therefore, of any limitation coming afterwards and depending upon them, could not affect the previous limitation, which was good in itself, any more than they could affect the estate for life given to *Arthur Trevor*, the grandson. The testator, it is true, has not drawn out his will *in extenso*, as I have supposed; he has used a more concise form; but the form which he has used, conveys to my mind precisely the same meaning. The words are, "to permit such person, who for the time being would take by descent as heir male of the body of the said *Arthur Trevor*, my grandson, to take the profits thereof until some such person shall attain the age of twenty-one years, and then to convey the same unto such person." Now, at the death of *Arthur Trevor*, one person only can answer this description, whether he be son, grandson, or great grandson of *Arthur Trevor*. He seems to me, therefore, to be the individual intended, the person designated by the words of this bequest, just as much as if the will had been in the more extended terms, which I have supposed. I cannot see upon what principle, that which I consider to be the plain and obvious meaning of the testator should be disregarded, in order to let in the operation of a rule of law, and altogether defeat his intentions. If, indeed, the first person who would take by descent as heir male of the body of the grandson, had died under twenty-one, the testator's ulterior intentions must be defeated, because they are contrary to the rule of law. But I do not think, that, in construing the will as I do, I am construing it by reference to the facts which have actually occurred, because by no possible state of circumstances could the taking of the person, who would be heir male on the

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death of the grandson, if he took at all, be delayed beyond the proper time.

The cases cited on the argument seem to me to be distinguishable from the present, except that of *Ibbetson v. Ibbetson*. I must confess that it is very difficult to distinguish that case from the present; and the great authority of the learned persons by whom it was decided makes me very doubtful in examining it. It seems to me to proceed on the supposition, that the two bequests, of enjoyment during minority and absolute ownership on attaining twenty-one, are to be taken as entirely separate and independent. The judgment of the Lord Chancellor begins by saying, that the bequest to the first tenant in tail in possession, who should attain twenty-one, is clearly too remote. And doubtless it would be so, and so would the bequest here to convey to the first heir male of the body of the grandson, who should attain twenty-one, be too remote, if it stood alone. It is observable that, in *Ibbetson v. Ibbetson*, the bequest was to permit the furniture to be used by the person and persons who for the time being should be entitled to the possession of the testator's mansion-house under and by virtue of the settlement made upon his marriage, or of the limitations contained in his will, until a tenant in tail of the age of twenty-one years should be in possession. In the present case there is no reference to any other document, nor any connection with the limitations under any other deed or will; but all the limitations affecting the rents and profits and the estate itself, and pointing out the persons who are to take, are in the will only. Whether that reference to the settlement in *Ibbetson v. Ibbetson* had any weight, and made it necessary to consider the provisions respecting the enjoyment and the ownership of the chattels as separate and independent, I know not; but in this case, with all deference, I cannot see how the bequest can be

separated. And if, as I see no reason to doubt, a Court must, in the event of the person who was heir male of the body of the grandson at his death being a minor, have given him the profits of the leaseholds during his minority, I see not how the Court could refuse to give him the leaseholds themselves on his attaining twenty-one. His taking the profits during minority cannot be objectionable on account of remoteness; why then should his taking the estates themselves? And surely the circumstance of his being of age at the death of the grandson cannot prejudice him, unless the bequest of the profits during minority, and of the estate itself on attaining twenty-one, be necessarily taken as separate and independent, which, as I have already said, I think cannot be done, since the testator has joined them, and made them in effect one bequest. Those who would have come after, in the event of his dying under twenty-one, stand in a very different position, I admit. I cannot help thinking that much of the difficulty of this case arises from the expression used in argument as to a devise to a class, and the authorities which show that in case one of a class be too remote the whole devise is void. I do not mean to throw the slightest doubt on those authorities, but I consider this not to be an instance of a bequest to a class. No two or more persons are here to take together. The whole object of the testator is to give the subject matter of his bequest to single individuals in succession, so far as regards the rents and profits; and those single individuals cannot be properly called a class merely because each in succession fills the same character of heir male of the body of the grandson. The right of the first of those individuals cannot, in any manner, as it seems to me, be affected by the circumstances surrounding the next of those individuals in succession, merely because in some sense all the individuals may be called a class.

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for the testator, for they would have given
bequeathed to some of the daughters, and
the will directed, in the event of the birth of
at too remote a period. The same observation
Leake v. Robinson (x). But in the present
giving the estate to A. will be so far from making
will, that it will be doing only that which, if
the will rightly, the testator has expressed
The case of *Trafford v. Trafford* (y) decided
the bequest was to be taken as a bequest of
go as heir looms, so far as the law would
question of remoteness was raised, though such
might have been raised, and was overlooked, as
Lord Eldon, in the *Countess of Lincoln v. Dacre*
castle (z). In *Ware v. Polhill* (a), all that
decides is, that a power to trustees to sell, &
travel through minorities for centuries, was before
the Court cannot model it to make it good.
it were necessary to model or alter the bequest
make it good, I admit that the Court could
The possibility that an executory devise may
the legal limits will not support it; it is barely
possibly exceed those limits. But here it appears
that the bequest, construed as it fairly and even

grandson; and that individual, be he what descendant he may be of the grandson, must, if he live to be twenty-one at all, attain that age within the legal limits.

In *Lord Southampton v. The Marquis of Hertford* (b), the bequest was, that the rents and profits, after payment of debts, should accumulate during the minority of all tenants for life and in tail, and be paid over to the first tenant in tail that should attain twenty-one years. Sir *W. Grant* said, "this is an attempt wholly to sever the surplus rents and profits from the legal estate, for a term which may extend much beyond the period allowed." In the present case there is no such severance, for the minor is to have the rents and profits during his minority, and the estate itself at twenty-one. In that case also there was no designation of any particular person, as I contend there is in the present case.

The case of *Tollemache v. Earl of Coventry* (c) is not directly in point; but, so far as it goes, it seems to me to be in favour of the view I have taken. There chattels were left to Lady *Vere* for life, and then to *Aubrey Beauclerk* (the son of Lord *Vere*, the testator, who became second Lord *Vere*) for life, and then in trust "for such person as shall from time be Lord *Vere*." This was held to be void as an implied bequest for life to the third Lord *Vere*, but was good to vest the chattels absolutely in the person who should be Lord *Vere* at the death of the survivor of Lady *Vere* and *Aubrey Beauclerk*, that is, the third Lord *Vere*. The persons who from time to time should be Lord *Vere* were called "a class," not, as I submit, quite correctly; yet the bequest was held good as to the first of that class, though void as to those who came after.

Some of these cases are examined by Vice-Chancellor *Wigram*, in his judgment in the case of *Ferrand v. Wilson* (d), which, I believe, was not in print when this case

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(b) 2 Ves. & B. 61.

(d) 4 Hare, 377.

(c) 2 Clark & Fin. 611.

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devises or trusts for accumulation, and to give to a person who may not come into existence until a certain period, the limitation is void. And if in such a will of the testator resolves itself into a simple declaration that a particular act shall be done, or a particular condition shall take effect, at a period which is more remote than the law allows in favour of a person designated, it is obvious that the Court may not model the power, and at the same time give effect to the actual intention of the testator, and the limitation may necessarily be void *in toto*. But why such cases are to furnish a rule for the construction of which, at the death of the testator, the state of the law is such that some at least of the estates given by the will may be supported, though others may be too remote to be given effect.

Many other cases were cited in the course of the argument. I do not propose to examine them separately. I am right in the construction I have ventured to put upon the will, I apprehend that this case is distinguished from all I have already said, from them all, except *Ibbetson*; and if I am wrong in that construction, the bequest cannot be taken separately as regards the persons who are consecutively the objects of it, and the whole must be held void. What the testator would have intended to do, I cannot say.

question is, what he has done. In my opinion he has given the rents and profits, during minority, to the particular individual who, at the death of the grandson, should be heir male of his body, and the estate itself to the same person if he attains twenty-one.

The event of that particular individual attaining twenty-one must, if it happened at all, happen within the legal limit; and that is obvious on reading the will, quite independent of the facts which have actually taken place. That bequest, therefore, I consider to be valid, and not to be in any way affected by the subsequent limitations which are intended to take effect in the event of that particular individual not attaining twenty-one.

Differing, as I do, in holding this opinion, from so many of my learned brethren, I feel most unfeigned distrust in that opinion; but as I cannot, after anxious consideration, see where I am wrong, I am bound to answer your Lordships' question according to my own view of the case, though with real diffidence. My answer is, that in my opinion A. was, under the circumstances, capable of making a good title to the leaseholds in question.

Mr. Baron *Alderson*.—After anxiously considering the question submitted by your Lordships to the Judges, I am obliged, with much regret, to come to a different conclusion from that arrived at by my two learned brethren who differ from me, because I certainly do feel with them that in so doing I shall in some degree contribute to deprive a party of benefits which, under the circumstances which have actually happened, it is probable the testator intended to give him. But it would be a dangerous precedent to allow the circumstances which have since occurred to vary the construction of the words used by a testator in making his will.

The principles upon which this decision must turn are not much in dispute. It is conceded that the rule against

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perpetuities makes void all limitations of personal estate, unless they necessarily vest, if at all, within a life or lives in being, and twenty-one years, and nine or ten months afterwards, a rule, as stated by Lord *Kenyon* in *Jee v. Audley(e)*, grown reverend by age, and not now to be broken in upon. The only question, therefore, is, whether the provisions of this will infringe upon this rule, and are therefore void.

Now the will may be divided into two parts ; one regulating the enjoyment of the intermediate rents and profits, the other disposing of the *corpus* of the property. In the first the testator contemplates the case of successive takers ; in the second, only one event, in which the *corpus* is to be once and finally disposed of. Each of these dispositions, however, if taken literally, will by itself, and independently of the other, violate the rule against perpetuities ; for the gift of the intermediate profits during minority, if it stood alone, might be delayed, by a succession of heirs of full age, to an indefinite period ; and the *corpus* being given to the first heir attaining twenty-one, might never come into possession within the limited period, by reason of a succession of minor heirs for an indefinite time. There is no doubt, however, that where a testator has by his will made a series of successive limitations, some of which fall within, whilst others exceed,

ing to the testator's expressed desire, and give effect to the former class alone. But where, without any such qualification to guide us, we find that a testator has, so to speak, bound up his intention in one particular form of expression, thereby including both these classes of limitations, it seems to me that we are not at liberty to vary those words which he has used, and at all events not without much clearer views of the testator's intention (as contained in the *words* of his will), to which alone we ought to look, than I am able to form in this case. I am not to conclude, from certain things which the testator has done, what in certain events it is probable he would have said should be done; but I am to look at the words he has used, and to judge from them alone what his real intentions were. Now here the testator has given the *corpus* of the estate, contemplating no succession of takers. It is given once only, and to one person alone. When is that person to take it? If we take the plain meaning of the words used by the testator, that is to happen at an indefinite period after his death. Now such a limitation cannot be by law. Am I then to translate these words into what it is contended are equivalent expressions, and to make the testator's meaning to be, that the *corpus* of the estate is to be successively given to a series of persons, and to each on a contingency, and by so doing to make a contingent limitation to one, the first of such a series, which must vest, if at all, with him, within the limited period allowed by law. To do so, I think, would be to open a very wide door to error and uncertainty. It would not be very difficult, in like manner, to divide the limitation in *Jee v. Audley* into two limitations; one to the children living at the testator's death, on the contingency that no subsequent children should be afterwards born, and a second limitation to all the children both born before and subsequent to the testator's death. I do not feel myself at liberty so to alter words used by the testator,

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the meaning of which is plain, for the purpose, by a somewhat refined and far-fetched translation of them, of doing what in the circumstances which have occurred, would probably be the particular justice of the case. Such a consideration equally existed and was present to Lord Kenyon's mind in *Jee v. Audley*, and was rejected by him when he decided that case. I am, however, by no means prepared to say, that if the translation suggested had been, with all its possible consequences, originally suggested to the testator for his adoption in lieu of the words used by him, that he would not have rejected it, both as not carrying fully into effect the whole of what he wished, and also as carrying into effect something which he did not wish to be done. Nor do I think that the gift of the intermediate rents and profits affords any sufficient light to vary this conclusion. The two limitations seem to me to be wholly independent of each other. Upon the whole, therefore, I say in this case, as Sir *W. Grant* did in *Leake v. Robinson*, that the Court cannot say what the testator would have done if he had been told that the whole of his intention could not be carried into effect; and that to modify the trust as here contended for, would be to make and not to construe the will.

I will very shortly advert to a few of the authorities in this case. They have been already fully brought before your Lordships by my learned brethren who have preceded me. As to *Taylor v. Biddall* (*f*), it is sufficient to say, that although there the actual decision of the Court was no doubt favourable to the view taken here by the appellant's counsel, yet the difficulty arising out of the rule against perpetuities does not seem to have been suggested. In *Trafford v. Trafford* (*g*), also, as is observed by Lord *Eldon* in *The Countess of Lincoln v. Duke of Newcastle*, (*h*) a considerable question, totally overlooked, was, whether

(*f*) 2 Mod. 289. (*g*) 3 Atk. 348. (*h*) 12 Ves. 233.

the limitation taken altogether was not too remote. Perhaps, however, Lord *Hardwicke* thought that the words "such male person" were in that case equivalent to "son," and so the limitation good.

But the present case cannot, I think, be distinguished at all satisfactorily from the principles laid down in *Ibbetson v. Ibbetson* (*f*), and the authorities there cited. I am not bound by that decision as an authority; but I may add, that I agree with it as having, I think, been well decided.

I am obliged, therefore, to answer your Lordships' question in the negative.

Mr. Baron *Parke*.—In answer to the question proposed by your Lordships, I have humbly to state my opinion, that A. was capable of making a good title to the leasehold estates, under the circumstances stated.

The question depends upon the validity of the direction to the trustees as to the disposition of the leasehold estates, and the profits thereof, after the death of the grandson B.; and whether, in the events which happened, A. took any and what equitable estate. In order to determine this question there is no doubt of the course to be pursued. We must first ascertain the intention of the testator, or more properly the meaning of his words, in the clause under consideration, and then endeavour to give effect to them, so far as the rules of law will permit. Our first duty is to construe the will; and this we must do, exactly in the same way as if the rule against perpetuity had never been established, or were repealed when the will was made; not varying the construction in order to avoid the effect of that rule, but interpreting the words of the testator wholly without reference to it.

When the words are construed, the rule of law against

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perpetuity is to be applied, and there is no doubt what the rule is. It is perfectly clear, that the limitation is to be construed as it would be read on opening the will at the testator's death, and is not to be governed by subsequent events; and every limitation in a will, by way of executory devise or bequest, which, regarded at the time of the testator's death, will not necessarily take effect, if it take effect at all, within the space of a life or lives in being, and twenty-one years afterwards (the time of gestation being involved in the description of life in being), is void.

The rule is incorrectly stated when it is said, as it is sometimes said, to require that the absolute interest given by the limitation should vest within that period; for it is clear that a bequest might be good, in which that would not necessarily happen; for instance, a devise to the first person who would climb up the cross of St. Paul's within twenty-one years from the testator's death, would certainly be good, though it was wholly uncertain whether it would ever take effect; but a devise to the first person who should do so, without that limit of time, would be bad. In the first case, the devise would necessarily take effect within the limit, if it took effect at all; in the second, it would not.

The propositions which I have stated are not, I believe, at all disputed; and the difficulty of the case lies in the interpretation of the clause in question, rather than the application of the acknowledged rule of law to it. By this clause the testator bequeaths his leaseholds to trustees,—“ In trust to permit his grandson B. and his assigns to take the profits of the same leasehold premises for and during the term of his natural life, and from and after his decease to permit such person who *for the time being* would take by descent as heir male of the body of the said B., his grandson, to take the profits thereof until some such person should attain the age of twenty-one

years, and then to convey the same unto such person so attaining the age of twenty-one years, his executors, administrators, or assigns; but if no such person should live to attain the age of twenty-one years, then in trust, to permit such person and persons successively who for the time being would take by descent as heirs male of the body of his the testator's son to take the profits of the same leasehold premises until one of them should attain the age of twenty-one years, and then to convey the same to such heir male first attaining that age, his executors, administrators, or assigns."

Now it must be admitted, that if the bequest of the estate itself, and of the profits, had been two separate bequests, each in a separate instrument, unconnected with each other, each of them must have been bad. A bequest to the first heir male of the body of B., who should attain twenty-one, supposing that the heir male was not of age at the time of the testator's death, would, according to modern authorities, and the law as now settled, certainly be bad, because it would not necessarily take effect, if at all, within the limits, and it might be a century or more before an heir male of the body would attain that age. In like manner, supposing the heir male were not a minor at the time of the testator's death, the direction to permit the heir male of the body for the time being, being a minor, to take the profits till his majority, if it stood alone, would be void, because it would be perfectly uncertain at the death of the testator whether any heir male of the body would answer the description of minor within the limits. And I agree that neither of these limitations, taken by itself, could be correctly expanded into a series of bequests, in the manner suggested in the very able argument of Mr. *Napier* at your Lordships' bar.

The bequest of the *corpus* to the first heir male, who should attain twenty-one, could not be treated in the same way as if the testator had left it to the first heir male

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of the body *living at the death of B.*, if he should attain twenty-one, and if he should die under that age, to the second, and so forth: nor could the bequest of the profits to such heir male as should for the time being be a minor, be treated in the same way, as if he had left the profits to the first *heir male of the body then living*, if a minor, and if he should die under age, then to the next, and so forth; for the words of the testator in these separate limitations do not import that he contemplated the individual heir of the body in existence at the death of B., or any other individual; he contemplates no one, except the person, whoever he may be, who first falls within the *category*, or answers the *description*, or satisfies the *condition*, of being an heir male of the body *attaining his majority*, or heir male of the body being a minor, and as filling those characters. I do not use the word "class," because that term is ambiguous, and is likely to lead to error.

In the first of the above cases, I have supposed that the heir male of the body was *not* of age at the testator's death; if he was of age then, as the will speaks, *quoad* the person to take, as at the time of the testator's death, the bequest to that heir male, would, I apprehend, be good; and in like manner, in the second case, if the heir male of the body were a minor at the testator's death, the bequest to him would also be good. In speaking, therefore, of the supposed cases of separate bequests, I assume throughout that, at the death of the testator there was no heir male major in one case, and minor in the other, to be in existence at the testator's death; and no doubt, your Lordships' question refers to a person A., not in existence at the testator's death.

If then the direction as to the profits, and as to the *corpus*, had each stood alone in separate instruments, I should have felt no doubt that both the bequests would be void, inasmuch as it could be truly predicated of neither, at the testator's death, that it would necessarily

take effect, if at all, within the limits. But in this case, the bequest of the rents and profits and of the *corpus* in the same instrument, and the same clause, raises a different question, and makes an important distinction between the present, and all the cases (except perhaps *Ibbetson v. Ibbetson*), where the devise has been held void for remoteness; and taking the whole clause together as a limitation of both the profits and the estate, I have come to the conclusion, that the bequest is good in part, that it may be correctly expanded into a series of bequests, as suggested, the first of which is unobjectionable.

It is clear that, according to the true construction of the words of this conjoint bequest of both profits and *corpus*, reading them at the testator's death, *some* benefit would belong to the person who should be at the death of B., heir male of the body, in whatever degree of descent he may be such, and would necessarily take effect within the limits, for that heir *must* have *either* the rents and profits, or the estate, at the death of B. The heir male of the body then in existence, would, if a minor, take the profits instantly, and would, if he attained twenty-one, take the *corpus*, or if already twenty-one, would take the *corpus* (for surely the testator's words are not to be construed to mean, that to take any benefit at all he must *be a minor* when B. dies); so that, though each of the two limitations, if it had stood alone, would be void, because it could not be predicated of it, that it would ever take effect, if at all, within the prescribed period, yet, taken together as one bequest of both, they must have effect in some way, and within the limits; they cannot be separated without defeating the testator's intention as expressed in the bequest; and the first heir male *must* take, and within the proper limits, either one or the other of the benefits given by the testator.

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trustees must do something with the profits or estate ; if the heir be a minor, they must give the profits, if a major, convey the *corpus*. There is no interval, no suspense of enjoyment of the estate for a moment, and no uncertainty, except as to the amount of the benefit, which also must be determined within the proper time. In the cases of a separate bequest of the profits alone, and a separate bequest of the *corpus* alone, no heir male of the body can take, except as fulfilling the condition of being heir male minor in one case, and heir male major in the other, neither of which conditions will be *necessarily* fulfilled within the limits ; but under the bequest in question, of both, he who fills the character of heir male of the body *at the death of B.*, be he the son, grandson, or other more remote descendant of B., must, *as such heir of the body, and simply because he is heir of the body at the time of the death of B.*, necessarily take, and, take then *either* the profits or the *corpus*, that is the inevitable result of the words used ; and, therefore, the case is the same in effect, as if the testator had so said, and had expressly directed the trustees, at the death of B., to give the profits to the *heir male then in being*, if a minor, and the estate, if he should be a major ; and if he should die under twenty-one, then to the next, if a minor, and the estate if a major, and if that heir should die under twenty-one, then to the next, and so on, in a series of consecutive limitations, as suggested by Mr. *Napier*.

A direction to give, after the death of B., to the first heir male who should be a minor, the profits, and the first heir male who should attain twenty-one, the *corpus*, in effect is the same thing as a direction to give the *first heir male* living at the death of B., *either* the one or the other, according as he was a minor or major ; and a bequest in these terms would be, not indeed, a bequest to an individual defined, but a bequest to an undefined one, who required no other condition to take it, than fulfilling the

character of heir of the body in existence at the death of B. There is a trust for the person who should fill that character, under all possible circumstances.

Under this limitation, it is to be observed, that the testator does not give the annual rents as an accessory to the bequest of the *corpus*, for the *rents* are not given to, nor to accumulate for the benefit of, the person who being heir male should attain twenty-one, a description, which no one might answer within the limits, and which bequest would be therefore void; but there is a bequest, uncertain in amount, *to the heir male of the body, minor or not*, in existence at the death of B., the profits if a minor, the *corpus* if a major, and a series of contingent subsequent bequests to other heirs of the body, which may or may not arise. As to the first member of the series, nothing is wanting to enable him to take that bequest, except that he should be heir male in existence at the death of B., and that condition must be fulfilled, if ever it is fulfilled, at the death of B., and in that respect he differs from every subsequent member of the series; with respect to them, the bequest may or may not take effect within the limits, and is therefore void.

I come, therefore, to the conclusion, that this is a bequest to a succession or series of persons, of whom the first taker must be in *esse* at the death of the tenant for life—must, if a minor, take the rents, and if a major, the estate; and if this view of the case be correct, and the interpretation of the testator's words faithful, I do not think there is any difficulty in holding the first limitation to be good, just the same as if that were the only limitation, though the rest are bad.

The last proposition seems to me to admit of no doubt. If this be a *series* of bequests, and if the first differs from all the others, and would be good if it stood alone, it cannot be made bad because other subsequent limitations are so; it must stand or fall by itself. And this bequest

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to a succession or series differs entirely from a bequest to a *class*, or number of persons to take together, which bequest is altogether void if it is in suspense at the death of the testator, and that suspense *may* continue for longer than the prescribed limits; for the quantum each is to take depends upon the number of the class, and if the class cannot be ascertained within the limits, neither can the quantum to be claimed by any one; therefore the whole is void.

I say that the bequest is void, "if in suspense at the testator's death, and that suspense may continue beyond a life or lives and twenty-one years;" for if at the testator's death it is not in suspense, or being in suspense such suspense must be determined within the limits, I apprehend it would not be void; as for instance, a bequest to A. for life, remainder to such of his children as should attain twenty-two, the bequest is void if the testator dies, living A., but not if he survives A., and at the testator's death all A.'s sons have attained twenty-two, for then the number of persons is ascertained at the testator's death. The two cases of *Leake v. Robinson* (i), and *Jee v. Audley* (j), are both instances of bequests to classes where the bequest was in suspense at the testator's death, and the suspense would not necessarily be determined and the number of the class ascertained within the limits, and therefore was void, upon the ground just stated. And it is on these cases on which reliance is placed—and I cannot help thinking, improperly placed—by the Master of the Rolls, Sir M. O'Loughlin, in giving the judgment appealed from, and by Lord Chancellor Sugden, in the case of *Ker v. Lord Dungannon* (k), to which I shall afterwards refer, as the distinction appears to me to be very clear between a bequest to a class who are to take

(i) 2 Mer. 363.

(j) 1 Cox, 324.

(k) 1 Dru. & War 509.

concurrently, and whose title depends upon a contingency common to all, that is, being in existence, and filling a particular character at a particular time, and a gift to a *series* of persons who are to take successively, and the title of the first of whom is different from the rest, and depends upon a contingency not common to the others.

In the bequest in question it is clear that the meaning of the words is, that if the heir male of the body at the death of B. is a minor, he must take the profits till twenty-one. If he attains that age, is it not meant that he is to take the estate itself? and, *vice versâ*, is it not clear, that the same person whom the testator intends to take the estate at his majority, he means to take the profits during his minority? The bequest of the rents and profits is, I think, inseparably connected with, and cannot be disunited from, the bequest of the estate itself, without doing violence to the testator's meaning; and if read together as one entire bequest of the rents and the *corpus*, it is the same as a bequest of the profits to the first heir male of a minor, and if he die under majority, then to the second, &c., and if he attain his majority, then the *corpus* to him. The *union* of the two bequests, each of which if separate would be void, because the estate is in suspense in each taken separately, removes the suspense in every respect, except as to quantum, and that only for a period not exceeding twenty-one years after a life in being.

It seems to me, therefore, that the present case mainly turns upon this point, whether the clause in question is truly and faithfully expanded into a series of consecutive bequests, the first of which is subject to a different condition from those subsequent, that condition being simply that the taker shall be heir of the body at the death of B. The doubts I have had on this case have been principally upon this point; but, after much anxious consideration of the subject, I am of opinion that this construction is

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correct, and thinking so, I feel bound to say, that if I am not precluded by the authorities, my opinion is that the limitation to the first member of the series would be good. If we refer to the authorities we shall find none, except perhaps that of *Ibbetson v. Ibbetson*, which stands in the least in the way of this opinion.

If reliance could be placed on the older authorities, the case of *Taylor v. Biddall* (l), would be decisive in favour of the claim of A.; for under a devise to the heirs of the body of *Robert Wharton*, as they should attain twenty-one, the heir of the body was held entitled at twenty-one by way of executory devise; but the question of remoteness was not argued; and the decision would go to prove too much, viz., that a bequest simply to the first male heir at twenty-one would be good. I therefore place no reliance upon that case; nor do I rest on that of *Trafford v. Trafford* (m), after Lord Eldon's observations in the *Countess of Lincoln v. Duke of Newcastle* (n). The case in your Lordships' house, of *Tollemache v. Earl of Coventry* (o) is referred to on both sides in support of their argument. The decision is surely an authority that in a limitation in a series of bequests, one which is within the limits may be good, though the others are bad; for your Lordships held, that where the bequest was of chattels to trustees in trust, after the death of the survivor of two lives in being, for such person as should *from time to time be Lord Vere*, it being the testator's will that they should be held and enjoyed with the title of the family, as far as the rules of law would permit, the chattels vested in the third Lord Vere, though the other bequests were too remote. The grandson of B. in this case is in the same condition as the third Lord Vere, the first in the series of Lords Vere, who must necessarily, if he took it at all,

(l) 2 Mod. 289.

(m) 3 Atk. 347.

(n) 12 Ves. 233.

(o) 2 Clark & Fin. 611.

take immediately after the death of the legatees for life. In *Mackworth v. Hinxman*, (p), where personalty was left to trustees, after life estates, to pay the interest to the person on whom the Baronetcy should devolve, so that each succeeding Baronet should enjoy for life, the first Baronet was held by Lord *Langdale* to be entitled, though all the rest of the limitation was void; and a similar remark may be made in *Bacon v. Proctor* (q). These are therefore authorities for making a distinction between the first and subsequent members of a series whose titles are distinct from each other.

It remains for me to make a few observations on two other authorities on which reliance has been placed in the argument of the respondent at your Lordships' bar. The first is the case of *Ker v. Lord Dungannon* (r) 531, in which Lord Chancellor *Sugden* expressed an opinion on this subject. I presume, I may say, that his opinion was given on the very case now under appeal to your Lordships, and cannot be put as being so high, certainly not as a higher authority, than if he had affirmed the decree of the *Irish* Master of the Rolls, which is now under the consideration of your Lordships; of course such an authority could not be binding upon your Lordships, the very question being whether the decision is correct. It is impossible, however, not to treat the opinion of either of these eminent Judges with the greatest deference and respect. The opinion of the Lord Chancellor is, that if this bequest could be construed into a limitation of separate and distinct gifts to individuals,—one to this particular person, and then a series of gifts over,—there could be no doubt but a valid gift would be made to the first taker. Now I have already assigned the reasons which induce me to think that the proper construction of the clause is to make a succession of bequests, not indeed to

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(p) 1 Keen, 658.

(r) 1 Dru. & W. 531.

(q) Turn. & R. 31.

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individuals, but to persons, the first of whom falls under a different category or description from the rest, and must take within the limits; and therefore the principle is the same, as if the gift was to individuals; and if I am right in this construction, Lord Chancellor *Sugden's* opinion is an authority in favour of my view of the case. I may be permitted to add, that most of the cases which he considered as bearing against the claim of the first taker, surely are distinguishable. *Leake v. Robinson* I have already remarked on; it was a bequest to a class, the numbers of which, and consequently the share of each, was in suspense at the testator's death, and would not be determined within the limits. In Lord *Southampton v. The Marquis of Hertford (s)* there was a trust to accumulate for the benefit of persons who would not necessarily come into existence within the limits. It was, as Vice Chancellor *Wigram* observes, in the case of *Ferrand v. Wilson (t)*, an attempt to give to a party who might not have come into existence for ages, and was therefore wholly void, and could not be modelled to preserve even partially the intention of the testator; if the Court had sustained it for the period allowed by law, it would have been equally void, because it would still be given to a person who might not by possibility be born for years; by stopping the account at any given point it would equally have been void. And the case of *Marshall v. Holloway (u)* on which also Lord Chancellor *Sugden* relied, is subject to the same observations.

In *Ware v. Polhill (v)*, the power of sale was one entire thing, not resembling a series of bequests; and even as to the invalidity of that power generally, though not with reference to the particular case, Vice Chancellor *Wigram* raises a considerable question in the judgment referred to. With the greatest respect, therefore, to Lord Chancellor *Sugden*, I am bound to say I do not see that these cases at all affect the validity of the *first* limitation in this case.

(s) 2 V. & B. 54.

(t) 4 Hare 377.

(u) 2 Swanst. 432.

(v) 11 Ves. 260.

I have now to consider the case of *Ibbetson v. Ibbetson* (w), on which also Lord Chancellor *Sugden* and Sir *M. O'Loughlen* both rely, as being the decision of two eminent judges. If that case can be distinguished from the present, it is of course not a binding authority. It may be so distinguished; for assuming that Sir *Charles Ibbetson* deceased, the tenant for life was the first of the series, as he was taken on the argument of that case to be, and whose title would coincide with that of A. The Vice Chancellor of *England* in giving his judgment expressly stated that it was unnecessary to decide whether Sir *Charles* took for life, as it was a void gift in remainder, or took absolutely, as he was residuary legatee; and Vice Chancellor *Wigram* observes, in the case referred to, that the case of *Ibbetson v. Ibbetson* was distinguishable on this ground, and also, that there is nothing in Lord Chancellor *Cottenham's* judgment inconsistent with the validity of the first limitation for the life of Sir *Charles*. In truth, however, the first of the series was the son of Sir *Henry* the testator, if there should be such a son, for the bequest was to the first heir in tail under Sir *Henry's* marriage settlement; and though he had no son at his death, he might have had one born after, who would have been the first taker, and all the succeeding limitations would be void because they would not take effect necessarily within the limits. It is, however, impossible not to collect from the judgments of the Vice Chancellor of *England* and Lord *Cottenham*, that they would have probably held the limitation in this case to be void. There is no proposition of law which they lay down with which I do not concur. It is a question of construction only; they would probably put on a clause very similar to this, a construction which differs from that which it seems to me that this ought to bear; and I feel it my duty, with the sincerest respect

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(w) 10 Sim 495; 1 Myl. & Cr. 26.

authority.

I have therefore humbly to give my opinion to your Lordships, that A. could make a good title.

Lord Chief Justice *Tindal*.—The opinion formed, upon the best consideration which I have given to your Lordships' question, is, that A., under the circumstances stated in the question, was *not* capable of making a good title to a purchaser of the leasehold by the testator's will, without the consent of the next of kin. And the ground upon which I have arrived at this conclusion may be stated in very few words. That the bequest to the trustees, "in trust to pay the income of B., to permit such person who for the time being would take by descent as heir male of the testator's grandson, to take the profits thereof until such person should attain the age of twenty-one years, and then to convey the same unto such person so attaining the age of twenty-one years, his executors, administrators, and assigns," is a bequest void in law; being a bequest limited as necessarily to vest and take effect within the period of time prescribed by law for that purpose. On the contrary, a bequest, the vesting of which is deferred during many successive minorities, will

essarily *must* take effect (if it takes effect at all) within period of a life or lives in being, and twenty-one years after, with a sufficient allowance in addition for the birth of a posthumous child. The other rule is, that if, at time of its creation, the limitation is so framed, as, *ex necessitate*, to take effect within the prescribed period, that is, if it is bad in its inception, it will not come valid by reason of the happening of subsequent events which may bring the time of its actual vesting and taking effect within the period prescribed by law.

Indeed, neither of these rules was in any manner disapproved on the part of the appellant at your Lordships' bar; the argument on his part was, that upon the proper construction of the bequest a distinction was to be made between A., the first taker under it, and those who follow him in succession. It was contended, that wherever a series of successive contingencies is provided for, each subsequent contingency being in substitution of the preceding, the prior contingency is to be considered independently of those which follow it; that you must sever the case of the first taker from the subsequent contingencies substituted in its place; and upon that principle, that inasmuch as A., in the present instance, had actually attained twenty-one before the testator's death, and was living at his death, and would have been entitled, if under twenty-one, to have received his profits, A., at all events, was clearly entitled to have the leaseholds conveyed to him, although all the limitations subsequent to his might be too remote. And the learned counsel for the appellant further contended, that the trust declared by the will as to the leaseholds might be expanded thus; namely, that the trustees were directed, upon the death of B., to permit the person who might then be his heir male to take the profits; if he attained twenty-one to give him a formal assignment of the legal estate; if he died under twenty-one, then that the person

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him whether A. should take, or A.'s son, son ; all that he would have answered, if a subject, would probably have been, in the will, " Some male descendant of B., who twenty-one." The testator, not foreseeing nor being aware of the rule of law, would have given the very same answer, if he had directed that the first heir male of the body of B. should attain the age of twenty-five. The question is not a question of intention of the testator in the construction of the will ; viz., whether the bequest is void by reason of the remoteness of the time. And it appears to me, in the first place, that there is no absolute necessity that there be a heir male of the body of B., who should attain the age of twenty-five, within twenty-one years after his death, but that the possibility of minorities may ensue for a longer period, so frequently that the bequest is void under the first rule, and again, that the circumstance of A.'s attaining the age of twenty-five having happened before B.'s death, does not, by the second rule, remove the difficulty.

I am unable, upon the plain and necessary construction of the words of this will, to discover any thing that would remove the distinction contended for between the cases of A. and B.

description of every one who is to take, as well of him who is to take first, as of all who follow after him ; it is made, as it were, a condition precedent that the taker is to be twenty-one, whoever he may be ; so that there seems to be no ground furnished by the will itself for any distinction whatever between the son of B. and his grandson, or any more remote male descendant who might first attain twenty-one after the death of B. ; and if so, the argument upon which any severance can be made between the bequest to the first person who should take under the description in the will, and any who follow in the line, falls to the ground. For as to the direction that the trustees shall permit " such person who for the time being would take by descent as heir male of B. to take the profits thereof, until some such person should attain twenty-one," which was mainly relied upon in favour of the appellant—such direction is quite independent of the bequest of the leasehold itself, and appears to me to have no more bearing on the construction to be put on the subsequent bequest of the leasehold itself than if such intermediate profits had been directed to be paid to an absolute stranger.

If A., instead of being of full age, as the fact was, had been under twenty-one at the death of B., and had been permitted by the trustees to take the profits until he attained twenty-one, and had then applied to the trustees for the conveyance of the leaseholds to him and his executors, I cannot perceive that the very same difficulty might not have been raised which has now been presented, or that he would have stood in any different position because he had actually received the profits during his minority. The same question must still have been asked of A., and answered by A., which is now raised, namely, whether the bequest of the leasehold itself was good in law ? It is indeed surprising, that if the difficulty could be removed in this case, by severing the bequest of the

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first taker from the subsequent bequests to the other takers in the series, and holding the latter to be the only bequests which are to be affected by the rule of perpetuity, that so ready a solution of the objection was not applied in any of the decided cases to which I shall afterwards refer as authorities, to all of which it was equally applicable as to the present. And as to the expanding of the bequest into the form proposed on behalf of the appellant, such expanded form would undoubtedly constitute a bequest in favour of the son of B., which would be unobjectionable; for under such expanded form the leaseholds would be made to vest in the heir male of the body of B. immediately on B.'s death, liable only to be divested by a condition subsequent, namely, the dying of such heir male under twenty-one, an event which could not happen in this case, as A. had attained twenty-one before the death of B.

But it appears to me, that the proposed mode of reading the will is not the interpreting of the will as it is, but virtually making a new will for the testator. By this mode of construction any devise in a will which is bad by reason of remoteness, on the ground that it may take effect after twenty-one years beyond lives in being, although it may also take effect within that period, may be resolved by a sufficient paraphrase into a devise upon the happening of the event within the period prescribed by law, which will make it a good devise. The question, however, which arises upon a will must in all cases be determined by grappling with the words of the will as they are found upon the face of it.

The decisions which were principally relied on as authorities in favour of the appellant were the cases of *Taylor v. Biddall*, *Stephens v. Stephens*, and *Trafford v. Trafford*. The case of *Taylor v. Biddall* must undoubtedly have been held a decisive authority in favour of the appellant, if the objection now under discussion had been

raised and presented to the Court, and had received its judicial consideration. But the weight of the decision of any Court as to any particular objection which is afterwards raised, depends entirely on the manner in which the case was argued, and whether the objection afterwards relied on was ever presented to the mind of the Court. The devise in *Taylor v. Biddall* was this:—"In case B. W. dies before he attains twenty-one, then to the heirs of the body of R. W., and to their heirs for ever, as they should attain their respective ages of twenty-one years." And undoubtedly that devise is not distinguishable, in substance, from the bequest in the present case. The devise "to the heirs of the body of R. W. as they should attain their respective ages of twenty-one years," and the bequest "to such person who for the time being would take by descent as heir male of the body of B. upon his attaining the age of twenty-one," must be admitted to be, in substance, the same devise. But in *Taylor v. Biddall* no objection was raised before the Court, that the devise "to the heirs of the body of R. W. as they should attain their respective ages of twenty-one," might let in a succession of minorities of children and grandchildren, so as to exceed the limit of twenty-one years after a life in being, before the estate would vest. The case was argued and decided upon the facts that had actually taken place. There was an heir of the body actually born in her father's lifetime, and ready to take on attaining twenty-one, and the Court looked no further. It is quite evident that in *Taylor v. Biddall*, which was decided when the rule by which executory devises were to be governed, was in its infancy, and which was the first case that extended the time for the vesting of executory devises from the termination of lives in being to the period of twenty-one years beyond, no question was presented to the mind of the Court but this; viz., whether as the heir of the body who should attain twenty-one might not have been born in

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Stephens v. Stephens (x). But the devise case was altogether free from the objection present one. It was a devise to such *sons* of the testator's daughter as should happen twenty-one; not, as in the present case, to *the body*. In that case there was no possibility of minorities continuing for a period of twenty-one years after lives in being, which question raised in the question proposed to us. *Stephens v. Stephens* does, indirectly, afford a proof that *Taylor v. Biddall* was really decided by the Court as if the executory devise had been limited to the issue of the testator, and that no question was raised before the Court on the point now under discussion; for the Judges of the Bench, when they certified their opinion to the House of Lords, say, "We find no case in which a devise of a freehold has been held good which depended the vesting of an estate until a son or daughter attain the age of twenty-one years, except *Taylor v. Biddall*." That case, therefore, as I have stated, cannot, as it appears to me, be cited as an authority upon the point submitted to your Lordships.

As to the case of *Trafford v. Trafford*

the testator's real estates, and that until such male person should attain twenty-one, the plate, books, &c. should be used by such male person, it being the testator's desire that the said plate, books, &c., might, in the nature of heirlooms, go with the said estate, and be used therewith as long as the laws of the realm would permit;" without attributing too much effect to the concluding clause of the devise as controlling, in the mind of the court, the danger of any perpetuity, the observations of Lord *Eldon* upon the authority of this case, in the subsequent case of *Lady Lincoln v. Duke of Newcastle* (z), place the authority of *Trafford v. Trafford* on its true footing. The effect of the words of the devise "to such male person," instead of "such son," was never adverted to by the court; a succession of minorities lasting for a longer period than twenty-one years after lives in being, never occurred to their minds; and, in the language of Lord *Eldon*, "a considerable question in the case was totally overlooked, namely, whether the limitation taken altogether was not wholly too remote."

Such then being the state of the leading authorities on the part of the appellant, upon consideration of those which have been brought forward on the other side, I think the latter are decisive of the present question. The case of *Proctor v. The Bishop of Bath and Wells* (a) is, in principle, the same with the present. An executory devise in fee "to the first or other son of T. P. who should be bred a clergyman, and be in holy orders," was held to be void, by reason of the contingency being too remote, on the ground of the uncertainty as to the time when such son, if he should have any, might take orders. It is obvious that the contingency might or might not take place within the prescribed time; but *that* was not sufficient. Just so in the present case, as to the heir male of the

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(z) 12 Ves. 232.

(a) 2 H. Blacks. 358.

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body who should attain twenty-one. In *Tollemache v. Earl of Coventry* (b), the testator bequeathed certain goods and chattels to trustees, upon trust to permit his son to have the use of them during life, and after his decease "in trust for such person who from time to time should be Lord Vere, it being his will that the goods should from time to time go and be enjoyed with the title of the family, so far as the rules of law and equity would permit." This House held the bequest to be void; the Lord Chancellor Brougham, on reversing the decree of the Court below, stating it "to be an attempt to create a new species of limitation in succession to spring up with the person, contrary to all rule and analogy for restricting the period for tying up or deferring the vesting of estates in fee or absolutely." And afterwards, with reference to a point on which reliance has been placed in the present case, his Lordship observed, that "to argue from the fact that the person was *in esse* at the date of the will, is to rely upon an accident. The event might have been otherwise; he would not *ex necessitate* answer the description within the allowed period." The case of the heir of the body who shall have attained twenty-one appears open to precisely the same observations.

The decision of the Lord Chancellor Cottenham in the case of *Ibbetson v. Ibbetson* (c) is admitted, as it must be, an authority in point against the appellant, and one that must be overruled if the appellant's argument is allowed to prevail. A bequest of personal property to trustees, to permit the same to be enjoyed by the person for the time being entitled to the possession of his mansion under a family settlement, "until a tenant in tail of the age of twenty-one years should be in possession of the mansion house," and then to go and belong to such tenant in tail, is indeed a bequest identically the same with the present. And lastly,

(b) 2 Clark & Fin. 611.

(c) 5 Myl. & C. 26.

the observations made by the Lord Chancellor, Sir *Edward Sugden*, in the case of *Ker v. Lord Dungannon* (d) upon the very bequest now under consideration, although not made upon the point in judgment before him, and therefore extra-judicial, and not to be cited as authority, are yet entitled to the weight which the reasoning upon the case, and the authorities cited, do of themselves intrinsically deserve.

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Upon the principle, therefore, above stated, and upon the balance of the authorities above referred to, I have arrived at the conclusion that the bequest under consideration is void on the ground of remoteness, the leaseholds bequeathed being made unalienable during a possible succession of minorities which may extend beyond the period allowed by law ; and that the difficulty is not removed by the consideration that on the actual event which took place there was an heir of the body who had attained twenty-one at the death of B., the first taker. And it appears to my mind to be of much greater importance that a general rule of law, which has governed and may affect many titles in the Kingdom, should be strictly upheld and enforced, than that it should be relaxed in any particular instance, in order to satisfy what may be well surmised to have been the wishes of the testator.

I do therefore humbly offer to your Lordships, as my opinion, in answer to the question proposed to us, that A. could *not* make a good title to a purchaser, without the consent of the next of kin.

The *Lord Chancellor* expressed the thanks of the House to the learned Judges, and moved that their opinions be printed.—Agreed to.

The *Lord Chancellor*.—After the elaborate opinion of the learned Judges contained in the papers on your Lord-

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(d) 1 Dru. & War. 509.

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ships' table, I shall not occupy any considerable portion of your time in stating the view which I entertain on this subject, and the grounds upon which I shall propose that the judgment of the Court below be affirmed.

The question arises out of the will of Lord *Dungannon*, which was made as far back as the year 1770. By that will he bequeathed certain leasehold estates to trustees in trust to pay the rents and profits to his grandson, *Arthur Trevor*, during his life, and after his death, in trust to permit the person who for the time being should take by descent, as heir male of the body of the grandson, to take the rents and profits until the time that some one of such persons should attain the age of twenty-one years, and then to convey the premises to that person, or in default of such person attaining the age of twenty-one years, then in trust for the descendants of the son of *Arthur Trevor*, subject to similar limitations. The question is, whether the son of *Arthur Trevor*, the grandson, who was twenty-one years of age at his father's death, was entitled to take these leasehold premises; whether he had a right to call for a conveyance.

Now the disposition of these leasehold premises, of the *corpus*, was to be to a person answering two descriptions. He was to be heir male of the body taking by descent from *Arthur Trevor*, the grandson, and he was to be of the age of twenty-one years. It is quite obvious that those two circumstances might not combine for many generations, and indeed it is possible that they might never combine. It is obvious, therefore, that this disposition of the property is void for remoteness; for, as everybody knows, property of this description must vest, if at all, within a life or lives in being, and twenty-one years afterwards; and, to speak with perfect correctness, a few months for gestation.

It is wholly immaterial in this case, that there was a person twenty-one years of age answering the descrip-

tion at the time; that is, to make use of a phrase of a noble and learned Lord in the case of *Tollemache v. The Earl of Coventry* (e), that was a pure accident; it might or might not have happened. Unless it is absolutely certain that the event must happen within the period prescribed, it is quite clear that the rule of remoteness applies to the case, and the devise becomes altogether void. It is quite unnecessary to refer to the several cases which are mentioned in the papers upon your Lordships' table in support of this position. It is admitted on all hands, and it is a point so certain and so clear, that it does not admit of dispute.

But, my Lords, it is supposed that this gift of the *corpus* of the estate is operated upon in some degree by the disposition of the intermediate rents and profits. The disposition of the intermediate rents and profits is to the person who for the time being should take by descent as heir male of the body of the grandson, until some such person shall have attained the age of twenty-one years. Now the disposition of the *corpus* of the estate is to a party answering two descriptions or qualities. The intermediate rents and profits are taken by a person or persons who answer one of those descriptions.

It appears to me, that the dispositions can exist entirely unconnected with each other, that they have no necessary relation to each other, and that the disposition of the rents and profits to particular individuals under this will, no more affects the disposition of the *corpus* of the estate, than if that disposition had been to mere strangers. On that point I concur with the opinion expressed by several of the Judges in the course of the argument, which they have addressed to your Lordships.

But then an attempt to obviate these conclusions, and to decide this question in favour of the appellant, has

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been made by putting or endeavouring to put a particular construction upon this will, or rather by endeavouring to translate the will into another form, and then upon that translated form to put the construction to which you are adverting. The course that is pursued is this : it is inferred that it was the intention of the testator,—or that you infer from that disposition that such would have been the intention of the testator,—to create successive estates, so that the first estate would, under the circumstances, have taken place, not be a void estate for remoteness; that the subsequent estate would take effect, and although the subsequent estate might come void from remoteness, that would not affect the first estate, to which that defect would not apply.

Several cases were cited for the purpose of leading to that conclusion. I do not refer to those cases, because I do not think the principle can be disputed, that if the estate in the order of succession is not void for remoteness; if it is a good estate, it would not be affected by the fact of the successive estates being void on account. It is a principle conceded, and I need no authority for that purpose. Then what is the estate created, or that is supposed to be created? It is described in this description : The testator intended the rents and profits to be enjoyed by the first descendant answering the description, until such person shall attain the age of twenty-one years.

estate so created should not be void for remoteness, although the subsequent estates should be void; that would not affect the original first estate.

Now, as it appears to me, looking at this will, the testator had one single object, which was to point out some individual at some future period answering a particular description, who should take this estate. He had not in contemplation the granting of successive estates in the terms which I have stated, and which are stated in the arguments of two of the learned Judges; he had no such idea in his contemplation; and if we were to adopt this construction for the purpose of getting out of the difficulty arising out of the law of perpetuities, we should be, in fact, as I consider, making a perfectly new will for the testator. We should be, in the first instance, translating the actual will into a new form, and we should be putting upon that will a construction which, I admit, if the will had been in that form, would have been the true and just construction. I never can lend myself to a measure of this kind, to the process of altering the frame of a will and the phraseology of a will, for the purpose of framing, as it were, a new will, in order to put a construction upon it to obviate the difficulties arising out of the law against perpetuities.

There is another difficulty in this case; a difficulty adverted to by many of the learned Judges;—if you can apply such a process in this case, you could have applied it in almost every case where there was a decision that the estate was void in consequence of remoteness. I will take, for instance, the case which was referred to by many of the learned Judges, the case of *Jee v. Audley* (f). What was the case? A bequest of 1000*l.* to the children of *John* and *Elizabeth Jee*, upon *Mary Hall's* dying without issue, or upon failure of the issue of *Mary Hall*.

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At the time of the testator's death there were four daughters. When the case came before the Master of the Rolls, Lord *Kenyon*, he decided that that bequest was void on this ground, that, in fact, after the death of the testator, another daughter might be born, it would be void as to her, and therefore void as to the whole set. On that ground the principle of the case was decided; and the case has never been questioned from that time to this: but apply to that case the process which has been suggested in the present case (and it would equally apply), and see what the effect would be to the existing daughters who should be living at the time of the event happening; if there were no other daughters born in the mean time, and if there were another daughter born in the mean time, then to the existing daughters and that daughter, what would be the result? As far as relates to the last disposition, it would be void: as far as relates to the first disposition, it would be perfectly good. And the same principle would apply to almost every case in which the Court has decided against the validity of a bequest in respect of its remoteness. What would be the effect, then, of introducing a new principle of this kind? It would break down all the decisions upon this subject. It would remove all those landmarks of the law which have been now for some time considered as firmly established; and I protest, therefore, against the doctrine which has been attempted, for the first time, to be introduced into this case.

Now, having stated why I think the only ground upon which this case is rested cannot be sustained, I shall refer your Lordships to one or two of the cases; but to the great mass of the cases it is quite unnecessary for me to refer, because they are cited merely for the purpose of establishing the various steps in the argument leading to a conclusion which I do not dispute, and therefore it is unnecessary to consider the cases. But there were two

cases cited, which if they were law, would support the proposition, I mean the case of *Taylor v. Biddall* (g), and the case of *Trafford v. Trafford* (h). Now, as to the case of *Taylor v. Biddall*, I need only repeat what has been stated by the learned Judges, that *Taylor v. Biddall*, was, in the first place, decided at a time when the law of executory devises was not fully settled; and, in the second place, no objection of this kind was made when the case was argued, or even hinted at. And in addition to this, the decision in *Taylor v. Biddall* is in itself at variance with all the modern authorities; it has no effect at least in supporting the case of the appellant. *Trafford v. Trafford* is open to many of the same objections, the point was never argued; there was not any interest in the parties to argue it. The heir at law was considered as the son, and after the observations made upon that case by Lord Eldon (i), no person can with any propriety think that any just reliance can be placed upon it. And in fact the learned Baron, whose able argument I have considered over and over again, repudiated those two cases, and did not pretend to rest upon them as an authority in favour of the conclusion to which he comes.

This brings me then to the only remaining case which I think it is necessary to consider, that is the case of *Ibbetson v. Ibbetson* (j). That does not seem to me to be in any material fact distinguishable from the present case. It was not argued on any different ground. In the first place it was argued most ably and most elaborately before the Vice Chancellor of *England*, a Judge eminently conversant with this branch of the law. That learned Judge took time to consider it, and pronounced an elaborate judgment. The parties were not satisfied with that judgment,

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(g) 2 Mod. 289.

(h) 3 Atk. 347.

(i) 12 Ves. 231-2.

(j) 10 Sim. 495; 5 Myl. &
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and they applied to my noble and learned friend Lord *Cottenham*. It was again argued before that noble and learned Lord very fully, and very ably, and very elaborately; and he confirmed the decision of the Vice Chancellor of *England*. It was not appealed to this House, it is true; the parties felt perhaps that it would be ineffectual to appeal. They felt the force of the judgment and the force of the reasons upon which that judgment was founded, and though it is not absolutely binding upon this House, inasmuch as it is not a decision of the last Court of appeal; yet, as an authority, it must be of great weight with your Lordships; and when, in addition to that, there really is no case to stand in opposition to it, I am quite sure that it will be conclusive with respect to your Lordships' decision in this case.

I have thought it right not to enter into detail in this case; for the reasons of the learned Judges are before your Lordships, and you have had an opportunity of considering all the details of the case. The outline I have presented to your Lordships; the ground upon which I recommend your Lordships to affirm the judgment, I have stated; and I shall conclude, therefore, by proposing to your Lordships that the judgment of the Court below be affirmed.

Lord *Brougham*.—Taking entirely the same view of this case with my noble and learned friend, I have only with him to say that I am extremely happy that the case has undergone so very ample a discussion, because the matter in dispute is of no inconsiderable amount; and the points of law raised on either side are of the highest possible importance to the law of real property in this country. The case underwent full discussion below, and it underwent a still more ample discussion here. The learned Judges were consulted, we have had an unusually numerous attendance given, eleven of those learned per-

sons attended, and they have given your Lordships elaborate opinions, after taking a considerable time to examine the question, make up their minds, reduce their opinions into writing, and deliver them in this place; and a circumstance has further occurred to give us the full benefit of their patient and deliberate consideration of the whole case; for after the opinions were delivered, the learned Judges have corrected those opinions for the press, consequently I have a right to say that we have the unusually deliberate and corrected opinions of the learned Judges to a degree for which I do not remember any precedent.

Now, my Lords, I will only make one remark upon the opinions of the two learned Judges who differ from the others. They fully admit the rule of law; they fully admit that for remoteness a bequest or devise is void, if it shall not of necessity take effect, if it take effect at all, within the period of a life or lives in being and twenty-one years afterwards, which, since the case of *Cadell v. Palmer* (*k*), is to betaken as the period added in gross to the life or lives in being, and totally independent of the accident which originally gave rise to the rule of law from *The Duke of Norfolk's Case* (*l*) downwards. The period of gestation has been added, but that is only in the particular event of gestation happening; but the rule of law is the term in gross of twenty-one years after the life or lives in being; that was clearly laid down by your Lordships upon my recommendation, after hearing the learned Judges in the case of *Cadell v. Palmer*, and it is quite unnecessary to go back to the foundation of the law: I have a strong opinion, which I believe is joined in by the profession at large, that it arises out of an accidental circumstance, out of a confusion, I may say, a misapprehension in confounding together the nature of the estate with the remedy at law by fine and recovery,

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(*k*) 1 Clark & Fin. 372. (*l*) 3 Ch. Cas. 1; 2 Freeman, 72.

Mr. Baron Parke is not quite correct in this exception. He says, "the rule is in when it is said, as it is sometimes said, to absolute interest given by the limitation at that period;" and then he puts a case to show it is not necessary to put a case to show that that understands the rule ever stated it. The rule is not that it must of necessity vest within the period, but either that it never shall vest within the period, if at all. Then Mr. Justice Patteson are cognizant of they also admit another matter, which is in the present case, as in all such cases of that it must be so applied, as to have no remedial circumstances, as I have stated in the learned Judges below have done me refer, when I reversed the decision of the Rolls, who had decided the case in the mean the case of *Tollemache v. the Earl*. In that case it was a pure accident, and of the thing; it must be of the necessity of the rule must not be allowed to be varied by accident.

Now, it is very well for you to lay as Mr. Baron Parke has admitted it to be is very well to get rid of the apparent contradiction.

because the doctrine which he lets in upon us, expanding the series, has been most justly characterised by my noble and learned friend in his very clear, and luminous, and convincing argument just now delivered to your Lordships, as one which would completely break down the best established rule of the English law with respect to remoteness, which there is not the least doubt upon. If I wanted an illustration of the dangerous effect, I would take it from the very apt illustration propounded by my noble and learned friend, and see how it would have worked in the case of *Jee v. Audley*. The judgment in that case, ever since it has been delivered at the Rolls, has been cited with uniform and, I may venture to say, universal approbation, and really it is as much established as law, though it never perhaps came into this House, as *Shelley's Case*, which also never came into this House. It is one of the corner stones of the law, nevertheless according to Mr. Baron *Parke's* doctrine, though he rejects Mr. *Napier's* very able argument, upon expanding to the series generally, he seems to me to take part of it to his aid, and to make it the foundation of his judgment; for I can see no other ground upon which he rests his judgment.

The other cases I only refer to, I need not deal with them, because Mr. Baron *Parke* and Mr. Justice *Patteson* themselves altogether repudiate *Taylor v. Biddall* (l) and *Trafford v. Trafford* (m). Lord *Eldon* has given a most satisfactory commentary upon *Trafford v. Trafford*, and *Taylor v. Biddall* was decided at a time when the law in respect to executory devises was in its infancy, and had not the light of recent discussions and decisions cast upon it. Of *Trafford v. Trafford*, Lord *Eldon*, in the case of *Lady Lincoln v. The Duke of Newcastle* (n), says, "a considerable question in that case was totally overlooked."

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(l) 2 Mod. 289.

(n) 12 Vcs. 218; see p.

(m) 3 Atk. 347.

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NOW what was that considerable question? Neither more or less than this, "whether the limitation, taken altogether, was not wholly too remote?" That was a very considerable question, and my Lord *Eldon* might well call it such, for that is the only question whereby that case touches the present. That is the very application of the present. Therefore as regards *Taylor v. Biddall* and *Trafford v. Trafford*, we have to put them out of view.

I do not perhaps quite go along with Chief Justice *Tindal* in holding that the case of *Procter v. The Bishop of Bath and Wells* (o) is in principle the same with the present, perhaps it may be in principle the same, and *Tollemache v. The Earl of Coventry* (p) might be said to be the same in principle with the present; but that is a little too remote from the present case, because the peculiarity which touches the present case did not exist in those cases. Therefore I do not rely either upon the one or the other. But still I must say that the doctrine laid down in *Procter v. The Bishop of Bath and Wells*, as far as it goes, much supports the doctrine upon which we are proceeding here. The doctrine laid down in the case of *Tollemache v. The Earl of Coventry* most distinctly illustrates and throws very considerable light upon the present, as was observed by the Vice Chancellor of *England*, before whom the case of *Ibbetson v. Ibbetson* came. That case has a most material bearing upon this case. I do not see how it is possible to decide this case for the appellant,—to reverse this decree—and at the same time to sustain *Ibbetson v. Ibbetson*. I do not see how you can sustain the case of *Tollemache v. The Earl of Coventry*. I am sure I cannot sustain the case, certainly not the doctrine; but as to *Ibbetson v. Ibbetson*, I do not detect a shade of difference between the two cases. The limita-

(o) 2 H. Blacks. 358.

(p) 2 Clark & Fin. 611.

tion was first to a certain series of heirs of real state in strict settlement. I believe there was a settlement as well as a devise, and I think the rent was made by the bequest to go under the settlement, and it was in strict settlement to go to a certain series of heirs, a bequest of the chattels to trustees to permit the different persons to take the rents and profits as they should successively come *in esse*, and come in possession under the settlement, with remainder to the person who should first come to the age of twenty-one years. How is that to be distinguished from the present case? Is not every one of the arguments of Mr. Baron *Parke* strictly applicable to that case? Because, according to this bequest, without a suspension of the estate, the trustees are directed to take the rents and profits; and so in that case there was an authority to the trustees to take the rents and profits, and then the question was, whether the devise of the *corpus* to the tenant in tail, when he should attain the age of twenty-one years, was not too remote.

Now as my noble and learned friend said, it is quite clear that that is the decision of two learned Judges of the Court of Chancery. It was never appealed to this House; but then it was not questioned; and it was not a trifling case, which would not be unappealed on account of the expense; it was a case that would have borne an appeal; the property was to go amongst very wealthy persons, so that if there had been a doubt entertained by the profession, it would have been appealed; and I will answer for it, though I do not know the facts, that not few opinions were taken upon the subject; and if all the counsel in that case were against the appeal, it was the result of all their deliberations that it was hopeless to appeal, and therefore there was no appeal against my noble and learned friend's decision and that of the Vice Chancellor, as my noble and learned friend has observed, a most learned lawyer in all respects, but in no one department of the law more to be

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regarded than upon the law of real property, being the son of a most eminent conveyancer in his and bred under him, he was himself a conveyancer therefore most skilful in administering the law of property. That decision, therefore, was not appealed from, because it was hopeless to appeal from it. I concur in the observations made by my noble and learned friend on the great authority of that case, and I shall be reversing that case beyond any doubt, if I reverse the judgment in the present case.

It only remains for me to say one word upon the judgment with respect to the rents and profits and the corpus. It is said that if I give by will the rents and profits of my estates to A., I give the fee; I give the *corpus*, no doubt; but it is also clear that I may give the rents and profits in such a way as to show by the residue of the will—I did mean to separate the rents and profits from the *corpus*, and I may give the rents and profits to one and the *corpus* to another, and though it does so happen in this case that it is not a stranger that takes the rents and profits, but the person who takes the *corpus* is an accident, and that comes within the rule that has so repeatedly referred to, which is stated in *Tollemac v. The Earl of Coventry*, and which the learned Judge

facie, draws the *corpus* with it. But on the other hand, it is competent to a testator to make within certain limits a temporary severment of the rents and profits from the *corpus*, and to enable any object of his bounty to call for the former, though he may not be entitled to the latter, and that has clearly been done by the testator in the present case. He has in effect directed his trustees to retain the *corpus* in their own hands, until some person answering the description of heir male of the body of B. shall attain the age of twenty-one, and then, and not till then, to assign the *corpus* to that person." I refer to that passage which dispenses with the necessity of my going into the argument.

There are cases in which it is not to be denied that the Judges always feel that there is a hardship, and I feel that myself, but such a feeling, though it may be very fit to enter the mind when you have made up your opinion, and after pronouncing your judgment, never ought to enter the mind so as to sway you in arriving at a conclusion, otherwise there would be an end of all certainty in the law, and its administration would be merely capricious. But it was said in the argument, that this was a surprise, that they were astonished at their right being questioned; I say that is not quite fair; for it is not at all true, because twenty-one years ago Mr. *Bell's* and Mr. *Preston's* opinions were taken upon it; therefore, there can be no surprise. It was not by the present Lord, but by his immediate predecessor, that these opinions were taken; there was a difference in them, but still a most learned conveyancer was against the argument now relied on. That difference is quite immaterial for this purpose. It clearly proves that there is no surprise in the case: there may be a hardship; it is a hardship, the being obliged to obey the rule of law, which all subjects are bound to obey.

I, therefore, agree with my noble and learned friend's proposition to dismiss the appeal.

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Lord Cottenham.—This is a case which, I think, may be reduced into the narrowest possible compass, because there is no dispute as to the rule of law. The two learned Judges who have given an opinion differing from that of the great majority, concurred in the rule, and the sole ground on which they differ from the majority of their brethren, was as to the application of the rule to the particular case put before them for their consideration. They admit that if the case of *Ibbetson v. Ibbetson*, is not distinguishable from the present, the rule of law, as laid down in *Ibbetson v. Ibbetson*, was correctly laid down. I am referring now to the two learned Judges who differ from the others. Mr. Baron Parke says, “it must be admitted that if the bequest of the estate itself and of the profits had been two separate bequests, each in a separate instrument, unconnected with each other, each of them must have been bad. In like manner, supposing the heir male were not a minor at the time of the testator’s death, the direction to permit the heir male of the body for the time being, being a minor, to take the profits till his majority, if it stood alone, would be void; because it would be perfectly uncertain at the death of the testator, whether any heir male of the body would answer the description of minor within the limits.” Then Mr. Baron Parke again at the conclusion of the opinion which he delivered, speaking of the case of *Ibbetson v. Ibbetson*, says, “there is no proposition of law which they lay down (speaking of those who decided the case of *Ibbetson v. Ibbetson*), with which I do not concur.”

Mr. Justice Patteson says, “If, indeed, the first person who would take by descent as heir male of the body of the grandson, had died under twenty-one, the testator’s ulterior intentions must be defeated, because they are contrary to the rule of law.” And, speaking of *Ibbetson v. Ibbetson*, he says, “the judgment of the Lord Chancellor begins by saying, that the bequest to the first tenant is

tail in possession, who should attain twenty-one, is clearly too remote, and doubtless it would be so, and so would the bequest here, to convey to the first heir male of the body of the grandson who should attain twenty-one, be too remote if it stood alone." Then the question is, does, or does it not stand alone?—stand alone, I mean, as contradistinguished from an estate given to a person who should, as this individual did, answer the description of the heir male of the tenant for life; the gift is to permit such person who, for the time being, should take by descent as heir male of the body of B., the grandson, to take the profits thereof until some such person shall attain the age of twenty-one years, and then to convey the same to such person so attaining the age of twenty-one years. Now it so happened that at the death of the first taker, the tenant for life, an individual answering the description of the will, had attained the age of twenty-one years, but that is a mere accident; you would be deciding, not according to the rule of law, which says that it shall be void, if it may not happen within the period of twenty-one years; but you are making it a good bequest, because it did by accident happen within the period of twenty-one years. Was it not very possible, in fact, more than probable (but it is quite sufficient, if it was possible), that at the time of the death of the grandson, the person next answering the description of the will, being heir male of the body of the grandson, might have been a minor, then he would have the rents and profits during his minority; but was it certain that he would ever have the estate? If he had died under twenty-one he would never have had the estate, because that is the qualification which is necessary to enable him to answer the description of the person taking the estate. He might have died under twenty-one, and he would be a person answering the description of heir male of the body: and no such person might have answered the description of attaining twenty-one. That is

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the exact principle of all the cases, and the event was within the description of the testator. The event might not have happened within twenty-one years; and if that might not have happened within twenty-one years, it is not to be said that the devise is a good devise because it has by chance happened. Admitting the principle to be perfectly settled, as those two learned Judges admitted it to be settled, in *Ibbetson v. Ibbetson*, and many other cases, about which there can be no doubt or controversy, the facts of this case bring it within precisely the same rule. The estate has failed, because it might not have happened within twenty-one years, although by accident it did happen within that time.

Lord Campbell.—Agreeing entirely with my noble and learned friends who have so fully discussed this case, I shall occupy but a very few moments of your Lordships' time. I never came to a conclusion since it has been my duty to act as a Judge more satisfactorily than I do upon this occasion.

The case was most ably argued for the appellant. It has been deliberately considered by the learned Judges, and I cannot complain of the time they have taken to consider, because it is clear that all of them have bestowed great pains upon it, and they have favoured your Lordships with most admirably written judgments. I refer to the Judges in the minority as well as the nine Judges forming the majority, and I do not at all complain of their revising their opinions in print, because my noble and learned friends, as well as myself, know, that when any thing is to be printed, it is very essential it should be revised.

I acknowledge that this is an open question, nothing has occurred before this by which we are bound; we have the opinion of that most learned Judge the present Lord Chancellor of *Ireland*, who certainly at the time had not the case argued deliberately before him, but being quite

familiar with the law of real property, he gave a very strong opinion upon the point. But still we are not bound by that opinion, any more than we should be in any case in which there had been an appeal from a decision of Sir *Michael O' Loughlin*, the Master of the Rolls to the Lord Chancellor of *Ireland*, which decision his Lordship had affirmed.

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Again, we have the case of *Ibbetson v. Ibbetson*, allowed to be on all hands identical with the present. There has been no attempt so far made, nor is there any attempt made by the learned Judges, to distinguish the two cases. That case certainly was decided in the first instance by a very learned Judge on the law of real property, the Vice Chancellor of *England*. There is no doubt that his opinion deserves very great consideration on all points, particularly with reference to this subject, with which he has been familiar for many years, and his decision was affirmed by my noble and learned friend, Lord *Cottenham*; but still there is no case which has come before this House in which the exact point has arisen; and although we ought to pay very great respect to the decisions of the Court below, upon which property must depend, after the cases have been decided and the decisions acquiesced in, yet we are not absolutely bound by them.

But setting aside all that was said by the Lord Chancellor of *Ireland*, and all that was said by the Vice Chancellor of *England*, and by my noble and learned friend the Lord Chancellor of *Great Britain* at the time the case of *Ibbetson v. Ibbetson* came before them, after having bestowed great pains upon the subject, and considered with great anxiety all the arguments, and having deliberately read over and over again the opinions of the learned Judges, I entertain not the slightest doubt upon it. The rule that a bequest of property must vest, if at all, within a life or lives in being and twenty-one years afterwards, and the period of gestation, which is now, as my noble and

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learned friend has said, considered a term in gross, is fully admitted, and I remember that when Mr. *Napier*, who argued this case very learnedly, propounded that rule, that there might be no doubt about it I asked him "Do you say *must*, or *may*?" and he said as he was bound to say, with his great learning and high character, "*must*." That being so, it is quite clear that if this had been merely a bequest of the *corpus*, it would have been within the rule, for this is not a bequest to an individual, but to a person who should answer the description of being heir male of the body of the grandson and who should reach the age of twenty-one years; and until this heir male of the body of the grandson reached twenty-one years, the *corpus* does not vest. Then it depends entirely upon there being a bequest of the rents and profits to a person who should answer the description. Now with my noble and learned friends who have preceded me, I am clearly of opinion that the *corpus* and the rents and profits are entirely separated; and that we are to consider this will precisely in the same manner as if the rents and profits had been granted to a stranger. That being so, it seems to me quite clear that this bequest is bad from remoteness.

I wish to speak with the respect I feel for the two learned Judges who have delivered contrary opinions; but I must say, that if we were to follow their advice, I know not what rule the House would lay down. I have been turning in my mind, what I should put in the marginal note as the point of law which this House would decide, if we were to reverse this decree, and I suppose it would be this,—that you must decide by the event. But really I think we should be upsetting all the decisions; upsetting the rule by which the real property of this country has been hitherto regulated, and laying down an entirely new rule.

Therefore, without hesitation, I concur in the motion of my noble and learned friend, that this judgment be affirmed.

The order appealed from was affirmed, with costs.

The GOVERNOR and ASSISTANTS of }
The IRISH SOCIETY - - - } *Plaintiffs in error.*

The Honorable and Right Reverend }
RICHARD LORD BISHOP OF DER- } *Defendant in error.*
RY and RAPHOE - - - }

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July 1, 5.
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May 19, 26;
June 22, 23;
July 7.

IN a *quare impedit*, where the Bishop of *Derry* claimed the right of patronage of a living in the county of *Londonderry*, which was within the diocese of *Derry*, a surrender made by a former Bishop to the Crown, of all the livings in that county, was tendered in evidence. This surrender was coupled with a grant by the Crown, dated two days afterwards, of the livings which had been so surrendered. Taken together, these documents were held to be admissible in evidence; and as the grant recited that all the livings in the county had anciently belonged to the see, such evidence was, for the purpose of proving the title of the Bishop, received as an admission by the Crown of that fact.

Quare impedit.
Evidence.

The value of such evidence was still open to dispute.

Before the date of the grant, the Crown had entered into articles of agreement with persons now represented by the Governor and Assistants of the *Irish Society*, to grant to them the livings in the county of which the living in question was named as one.

Held, that this agreement did not prevent the grant from being receivable in evidence, however its value might be thereby affected.

Two letters from the Crown to two successive Bishops of *Derry*, directing them to perform the covenants and directions contained in the grant, were tendered in evidence as recognitions by the Crown of its previous grant.

Held, that they were admissible for this purpose.

Entries in the books kept at the First Fruits' Office are admissible to shew the fact of a collation to a living made by the Bishop at a particular time.

Returns made by the bishop, in obedience to writs from the Exchequer, requiring him to state the vacancies of and presenta-

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tions and collations to the livings in his diocese, are admissible in evidence as statements made by a public officer in the discharge of a public duty.

Though such returns may contain statements of a kind unusual in such documents, which statements were in favour of the right of the bishop who made them, they are nevertheless admissible, provided that the statements are within the scope of the enquiry in the writ.

An original collation from the registry of the bishopric, and appearing on the face of it to be *pleno jure*, is admissible to shew that the right claimed has in fact been exercised.

An objection was taken that certain documents tendered in evidence were not admissible for a particular purpose. The Court decided that they were admissible. An exception was taken to this decision.

H_{ELD}, that if the documents were admissible on any ground, the exception could not be sustained.

In such a case a Court of Error can only look at the record, and decide upon the propriety of the ruling, as therein stated.

—

THIS was an action of *quare impedit*, brought by the plaintiffs in the Court of Common Pleas in *Ireland*, to recover the advowson of the church of *Camus* in the city and county of *Londonderry* in *Ireland*. The declaration contained eight counts; to each of those counts several pleas were pleaded by the defendant the Bishop of *Derry*; on those pleas respectively issue was joined by the plaintiffs. The action was tried at bar, in the Court of Common Pleas, by a jury of the city and county of *Londonderry*, when a verdict was found for the defendant. In the course of the trial, several documents were produced and read in evidence by the defendant's counsel, to the admission of which the plaintiff's counsel objected, and upon the Court receiving them, tendered a bill of exceptions. This bill of exceptions having been signed by the Judges, the record was removed into the Court of Exchequer Chamber; and on the 21st of *April*, 1842, the judgment

of that Court (nine Judges being present, the Lord Chief Justice *Pennefeather* declining to take any part from his having been the leading counsel of the plaintiffs, and Barons *Foster* and *Lefroy* being absent) was delivered by the Lord Chief Justice of the Common Pleas, affirming in general terms the reception of the said evidence. To reverse this judgment the present writ of error was brought.

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The plaintiffs in this case were incorporated by King *James I.*, by the name of "The Governor and Assistants, *London*, of the new plantation in *Ulster*, within the realm of *Ireland*." (a)

In the year 1608, the greatest part of six counties in the province of *Ulster*, had, upon the attainder of the Roman Catholics involved in the then recent rebellion, been escheated to King *James I.*, in right of his Crown; and about that year the King, with the advice of his Privy Council, became desirous of planting a settlement or colony of his Protestant subjects on the escheated lands. With that view, his Majesty proposed to make grants of portions of the escheated lands to such of his Protestant subjects as might be willing to undertake the planting and settling them, upon certain terms and conditions.

The citizens of *London*, among others, accordingly advanced large sums of money for the above purpose, and received letters patent, incorporating them by the name before-mentioned, and granting them very extensive tracts of land, and also various advowsons, of which the plaintiffs contend, that *Camus*, the living in question, is one.

The course of evidence at the trial was as follows:—The plaintiffs to maintain and prove their right to the advowson of the church of *Camus*, as derived by them through the Crown, gave in evidence the following docu-

(a) For a full statement of the circumstances relating to the incorporation of the *Irish Society*, see the case of *The Skinners' Company v. The Irish Society*, ante, p. 425.

the King granted and confirmed to his said heirs, the cities of *Dublin* and *Limerick*, and sessions which had been excepted out of the grant: Thirdly, letters patent from Prince Lord *Walter de Burgo*, whereby the said letters were confirmed to Lord *Walter* and his heirs of *Ulster* in *Ireland*, except as therein is expressed: the plaintiffs further proved, that Lord *Walter* having died, he was succeeded in his estates and perties by his eldest son *Richard de Burgo*, after the death of his father, became Earl of *Ulster*: Fourthly, the record of a judgment in the said case had in the Court of Common Pleas in the twenty-seventh Edward I., in which the *Ulster* was plaintiff, and *Galfridus*, then Bishop of *Down*, was defendant; whereby the Earl recovered the manor of *Drumcose*, in the said diocese of *Derry*: Fifthly, a judgment in another suit of *quare impedit* in the said year, and between the same parties, whereby the Earl was adjudged to be entitled to present a fit and proper clerk to the church of *Camus*, in the diocese of *Derry*: Sixthly, a writ of *levari facias*, directed to the sheriff of the county of *Derry*, therein mentioned, in the twenty-seventh Edward I., by which the return of the sheriff thereto, by which w

an act passed in the tenth year of the reign of King *Henry VII.*, enacting (*inter alia*) that the said King should present to the advowsons which formerly belonged to the Earls of *Ulster*, and as being then annexed to the Crown. The plaintiffs further gave in evidence a certain commission, bearing date the 21st day of *July*, 1609, issued by King *James I.*, and enrolled in the Court of Chancery in *Ireland*. This commission appears to have been directed, among others, to *George*, then Bishop of *Derry*, appointing those persons commissioners, with full power and authority to inquire and determine what hereditaments of various kinds, including advowsons in the several counties of *Armagh*, *Coleraine* (now *Londonderry*), *Tyrone*, *Donegal*, *Fermanagh*, or *Cavan*, belonged to the Crown. The plaintiffs further gave in evidence certain articles of instruction annexed to this commission, and enrolled in the Court of Chancery, in *Ireland*.

The plaintiffs further gave in evidence from the Rolls of Chancery, in *Ireland*, a certain inquisition taken under the authority of the commission above-mentioned at *Lymavaddy*, in the county of *Coleraine*, on the 30th day of *August*, 1609. By this inquisition, which appears to have been signed by *George*, then Bishop of *Derry*, it is found among other things, that there was in the said county of *Coleraine*, (now *Londonderry*), the parish of *Camus*, wherein were both a parson and vicar, and it is thereby also expressly found that all presentations, rights of patronage, and advowsons of churches within the said county of *Coleraine*, did then of right belong and appertain to the King's Majesty, in right of his Imperial Crown; but that the Bishop of *Derry* might and did, until the statute of the eleventh of *Elizabeth* therein referred to, place a clerk in any parsonage or vicarage, being void, until the King either presented or bestowed the advowson upon the Bishop or some other person.

The plaintiffs further gave in evidence articles of

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other part, concerning a plantation in part
of *Ulster*. By the ninth clause of the
agreed that the City of *London* should have
of all the churches, as well within the City
and town of *Coleraine*, as in all lands to be
them. The plaintiffs further gave in eviden
the King, also enrolled in the Court of Chanc
dated 4th *February*, 1609, addressed from
Whitehall, to Sir *Arthur Chichester*, then I
Ireland, announcing that the work of th
Ulster, undertaken by the City of *Londo*
last resolved on, and that articles of agreem
absolutely concluded between his Majesty
City; and letters patent of *James I.*, date
1613, which appeared to be enrolled in 1
which the undertakers were incorporated
same letters patent the advowsons, dona
posals and rights of patronage of all and sing
vicarages, and chapels, of and in the said c
derry, and of all and singular churches,
chapels of and in the village or town of *Col*
the advowsons, donations, free disposals an
tronage of all and singular the rectories a
Thurlockt, Finglagon, Thurlockt, and 4th

in the county of *Coleraine*, and also of the rectory and church of *Faughenvale*, in the barony of *Annaght*, in the said county, were all expressly given and granted to the Governor and Assistants and their successors ; To have, hold, and enjoy the same, and all and singular other the premises by the said letters patent granted or mentioned to be granted, with the rights, members and appurtenances, to the Governor and Assistants and their successors, to their sole and proper use and behoof for ever. The plaintiffs also proved a presentation by the King upon lapse of *Alexander Spicer*, clerk, to the rectory of *Camus*, within the diocese of *Derry*, and that *Spicer* was duly instituted to the living. The plaintiffs also gave in evidence an entry contained in a book kept as of record in the First Fruits' Office in *Ireland*, from which it appeared by the certificate of *John*, then Bishop of *Derry*, that one *Thomas Vesey* was in the year 1634 admitted to the said rectory of *Camus*, in the county of *Londonderry*. And an entry in another book kept as of record in the First Fruits' Office in *Ireland*, from which it appeared by the certificate of *Robert*, then Bishop of *Derry*, dated 28th October, 1672, that one *Jonathan Edwards*, was instituted and inducted to the rectory of *Camus*, on the 1st May, 1672. The value of the living was proved to be about 850*l.* a year.

The counsel for the defendant, to support his case, tendered in evidence several documents, all of which were objected to by the plaintiffs, but were received in evidence, and their admission formed the twelve heads of the Bill of exceptions. The first was a document dated the 1st August, 1610, the original of which had been enrolled in *England*, but not in *Ireland*, and had not been confirmed by the Dean and Chapter of *Derry*. This was produced for the purpose of showing an admission on the part of King *James I.*, that the advowson of the church of *Camus* did anciently belong to the Bishopric of *Derry*. It purported to be a surrender by *Geroge Montgomery*,

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then Bishop of *Derry, Raphoe* and *Clogher*, into the hands of *James I.*, of several hereditaments therein mentioned, and amongst others of the rectory and parsonage of the *Derry*, formerly appropriate to that see for the maintenance of his table; and also of all parsonages, vicarages, impropriations, advowsons, patronages, nominations, presentations of churches, chapels or parishes, as well within the diocese of *Derry* and county of *Coleraine*, as within all other counties and baronies within the several dioceses of *Derry, Raphoe*, and *Clogher*, in the realm of *Ireland*, (except in the county of *Monaghan*), which did belong or appertain, or were parcel or part of the said Bishoprics or any of them, or whereto, he the said *George*, had or ought to have any right of presentation.

The second was a document which had also been enrolled in *England*, but not in *Ireland*, dated 3rd *August*, 1610, which was offered, not for the purpose of proving title in the defendant, but for that of proving an admission on the part of King *James I.*, that the advowson of the church of *Camus* anciently belonged to the Bishopric of *Derry*. This document purported to be a grant from the king to *George Montgomery*, then bishop of *Derry*, and his successors for ever, of a great variety of lands, tenements, and hereditaments therein particularly mentioned and described; and a grant also of the advowsons, donations, free disposals, and rights of patronage, of all and singular the rectories, churches, vicarages, chapels, and other ecclesiastical benefices whatsoever to the premises therein before granted, or to any part or parcel thereof belonging, appertaining, appendant, or incumbent, and to the same Bishopric of right belonging and appertaining, and to which the Bishops of *Derry* and their successors were accustomed to present or collate, as by the survey thereof, then lately taken in *Ireland*, and under the Great Seal of *Ireland*, then lately exemplified at *Dublin*, the 26th *January* 1609, appeared. The survey itself was not

given in evidence. Out of this grant, were excepted nine advowsons out of the number of fifteen advowsons within the county of *Coleraine*, which, it was stated in the grant, were by the mutual consent of the then late bishop of *Derry* and citizens of *London*, to be transferred from the said Bishop of *Derry* and his successors to the said citizens; and in the said document it was further stated, that the said *George Montgomery*, then Bishop of *Derry*, did thereby for himself and his successors, covenant with the said King *James*, his heirs, &c., that he the Bishop of *Derry*, with the consent of the chapter of the said bishop, should make and execute such assurances, acts, things, and devises as should in that behalf be required concerning the conveyance and assurance of the advowsons, and other the premises, in the said presents excepted, to the said King, his heirs or successors, or any other persons, bodies politic and corporate, according to the appointment and requisition of the said King, or the deputy and others of the Privy Council of *Ireland*, as therein to be done in that behalf; and it was recited, that the King had been informed that there were in the county of *Coleraine*, and within the said diocese of *Derry* fifteen advowsons of churches, rectories, and other ecclesiastical benefices, anciently belonging to the bishopric of *Derry*, and that by mutual consent and agreement between *George Montgomery*, then Bishop of *Derry*, and certain citizens of *London*, who lately undertook the planting and inhabiting of certain lands in the province of *Ulster* in *Ireland*, it was then lately concluded and agreed upon, that the then Bishop of *Derry*, and his successors, should have only six advowsons of the fifteen advowsons; and the document purported to point out and direct the manner in which the said fifteen advowsons were to be chosen by and divided between the Bishop and the citizens respectively, so as to give six to the Bishop, and the other nine to the citizens for ever.

The third document was a copy, duly attested and

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compared, of a certain instrument enrolled from the Rolls Office of the Court of Chancery in *Ireland*, dated 11th *August*, 1610. This instrument purported to be an appointment by King *James I.*, of one *Brute Babington*, D.D., to the bishopric of *Derry*, then vacant by the resignation of *George Montgomery*, and giving him the mesne profits appertaining to the bishopric, since the 2nd day of May then last, and it purported to enjoin Sir *Arthur Chichester*, then Deputy-Governor of *Ireland*, &c., to cause *Babington*, and the dean and clergy of the diocese of *Derry*, to execute and perform such covenants and directions as were comprised in the letters patent of *George Montgomery* on the part of the Bishop of *Derry*, and his successors, to be performed.

The fourth was a document of a similar kind, being the appointment of *Christopher Hampton* to the bishopric on the 21st *December*, 1811. It contained the same injunction as the former appointment.

The fifth piece of evidence tendered and received was an entry appearing in a book produced from the First Fruits' Office in *Ireland*, from which book the plaintiffs' counsel had read on behalf of the plaintiffs an entry respecting the admission of *Thomas Vesey* to the rectory of *Camus*, in the year 1634. The entry proposed to be read, and read on the part of the said defendant, purported to be an entry of admissions, returned in Easter Term, 1630, and stating that one *John Freeman* was collated and admitted on the 7th day of *October*, 1629, to the rectory of *Camus*.

The sixth piece of evidence was another entry, appearing in another book produced from the First Fruits' Office in *Ireland*, and purporting to be an entry of admissions returned as of Easter Term, 1686; and stating from the certificate of *Ezekiel*, then bishop of *Derry*, that one *Walter Forest*, clerk, was collated on the 25th day of *March*, 1686, to the rectory of *Camus*.

The seventh piece of evidence tendered and received was an entry contained in a triennial Visitation Book of the Archdiocese of *Armagh* in *Ireland*, of the year 1664, which entry purported to state, that one *Brian Roche*, Master of Arts, rector, was admonished to exhibit letters of orders or to procure a certificate in two months, that he exhibited his collation and institution to the rectory of *Camus M' Cosquin*, dated the 17th *June*, 1661, with a mandate to induct the same day.

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The eighth, ninth, tenth, and eleventh documents tendered and received were writs produced from the First Fruits' Office, and purporting to be issued from the Court of Exchequer in *Ireland*, on the 12th *February*, 1716, the 5th *May*, 1787, the 12th *February*, 1797, and the 11th *July*, 1821, and directed to the successive Bishops of *Derry*, commanding them respectively to make a return to the Barons of the Exchequer, of the dignities, benefices, offices, or promotions spiritual therein mentioned, which, from certain dates in the said writs respectively mentioned, had become void, and what rectors, vicars, or other beneficed clergymen had been admitted, instituted, collated, or inducted thereto. To each of these writs was appended the return made thereto, and each stated the collation of a rector to the rectory of *Camus*.

Lastly, the counsel for the defendant produced and offered in evidence a document found among the records of the diocese of *Derry*, purporting to be a collation of the Reverend *Thomas Richardson* to the rectory of *Camus*, by *William*, then Bishop of *Derry*, which recited, that the rectory of *Camus*, being then vacant, did belong to his collation and free disposal, in full right.

The Court of Common Pleas having given judgment for the defendant on every one of these twelve grounds of exception, the record was removed into the Court of

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Exchequer Chamber, where the judgment of the Court of Common Pleas was affirmed.

This writ of error was then brought.

The Judges were summoned: and Lord Chief Justice *Tindal*, Justices *Patteson*, *Williams*, *Coltman*, *Mauk*, *Creswell*, and *Wightman*, and Barons *Parke*, *Rolfe*, and *Platt*, attended at the argument.

Sir *T. Wilde* and Mr. *Boyd* (Mr. *James Wilde* was with them) for the plaintiffs in error.

The plaintiffs having proved a title in the Crown, and then in themselves by grant from the Crown, the defendant set up as an answer to the plaintiffs' case, that the Crown had admitted the living of *Canus* to be in the Bishop. This was the object of all the documents produced by the defendant. It is submitted, that no one of them was admissible for this purpose.

The first of these documents was the surrender. This was not admissible for any purpose of the kind for which it was tendered, for the Crown was not in any way connected with that surrender. To make such an instrument admissible in evidence, it ought to appear that the Crown was in some way a party to the surrender. There was no evidence of that kind here. Then, again, the surrender was inoperative. It was not enrolled; and the Crown cannot give or part with anything except by deed enrolled: *Duchy of Lancaster* case (b); the *Sadlers'* case (c); *Comyns Digest* (d); *Fulmerston v. Steward* (e); *Wrotli's* case. (f)

It will be said that the deed was enrolled in *England*. But the enrolment in *England* cannot give effect to a deed which is to operate on lands in *Ireland*. *Pilkington's* case (g) shews that *Ireland* is, for such a purpose, a sep-

(g) 1 Plowd. 213.

(e) 1 Plowd. 102.

(f) 4 Co. Rep. 54.

(d) Tit. Prerogative, D.

(c) 20 Hen. 6.

rate kingdom, though even that is not necessary, for the same result would happen in a peculiar jurisdiction. Thus, the recovery by judgment here of lands in a county palatine, has been held void for want of jurisdiction; *Brooke's Abridgment* (h); *Carteret v. Petty* (i). This doctrine has received a legislative confirmation, for the 41 Geo. III., c. 90, shows that before that act, a recognizance here could not affect lands in *Ireland* till it had been enrolled in the Exchequer there.

Another ground of objection is, that the surrender had not been confirmed by the Dean and Chapter, and without their confirmation it was simply void: *Co. Lit.* (j); *Bishop of Salisbury's case* (k). So far as the surrender alone was concerned, it was with a view to the purpose for which it was produced, but a mere piece of waste paper. But then it will be said, that the surrender became evidence when connected with the grant by the Crown, made two days afterwards. That would not make the surrender admissible. If the grant is of any avail, the surrender is immaterial; if the grant is of no avail, the surrender is useless; in either way the surrender cannot be made evidence for the defendant.

Then as to the grant, that instrument is void, for it is founded on a void surrender. (The *Lord Chancellor*.—There is no recital that it was in consideration of the surrender.) There is not. (The *Lord Chancellor*.—It was a re-grant.) It was not intended to be so. It does no more than confirm the title of the Bishop and of some other clergymen. It did not give them any new rights; it affirmed the old, but it did not give anything which the see did not before possess. It was a mere grant of all rectories, &c., to which the Bishops of *Derry* and their

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(h) Cinq. Ports. 18.

(j) 103.

(i) 2 Swanst. 323, n., nom.

(k) 10 Co. Rep. 58 b.

Cartwright v. Pettus, 2 Cas. in Ch. 214.

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successors had before been accustomed to collate. This certainly was not a grant which was admissible for the purpose of proving a title then created in the Bishop. In fact, it was rather a restriction than a grant, for otherwise it would have been a violation of the agreement previously entered into between the Crown and the City of London. That agreement being of a prior date, the Crown, even if still continuing in possession of these livings, must be considered to have been so only as trustee for the City of London, to which the Crown had agreed to convey them. The declarations of a trustee cannot be made evidence against the *cestui que trust*.

There is another objection to the admissibility of this grant. It is founded on information which was not true. If the Crown makes a grant, the information on which it acts must be true, or the grant will be void. Assuming, therefore, that this document is a grant, it bears on its face a statement which makes it void, and, therefore, inadmissible for any purpose whatever. It states that the king was informed that there were within the county of *Coleraine* and diocese of *Derry*, fifteen advowsons anciently belonging to the Bishopric of *Derry*. It is not pretended that that statement is true. The grant, therefore, if tendered as an admission by the Crown in favour of the Bishop of *Derry*, cannot be received for two reasons, first, that the suggestion on which the grant purports to be made, is an assertion of the grantee in his own favour, and is no declaration of the Crown; and, secondly, being false, it avoids the grant. In all cases in which the Crown is concerned, it is the duty of the subject to inform the Crown truly of its rights. There is but one exception to this rule, and that is where the matter is that with which the subject cannot be acquainted. The authorities on this point are clear. Among the earliest of them is that of *Holland v. Fisher* (1). There the rule

(1) Bridgm. Rep. 181.

stated in *Alton Wood's Case* (m), *Barwick's Case* (n), *Tanistry Case* (o), and *Legat's Case* (p), was most fully adopted. It was held in *Holland v. Fisher* that where the king intendeth to pass one estate, and the patent in effect passeth more than one, the king is deceived, and the patent is void; and when instead of one entire continuing estate, several estates in fractions are created by a patent, that patent is void. Nothing can be clearer than this doctrine, nothing is better established. And the principle is applied with great strictness. The case of *Legat* is a strong instance of this. In that case there was a grant by letters patent of two pieces of land, called *N.* and *W.*, containing fifteen acres in *Wymondham*, in the county of *N.*, lately in the tenure of *C.*, and formerly belonging to the late monastery of *W.*, *quæ quidem præmissa a nobis, &c., concedata et detenta fuerunt*. The lands were parcel of the manor of *W.*, and it was found by special verdict that the said manor *non concedat, nec detent' fuit, sed fuit in onere et compoto*: and the rents and profits (except of the two pieces of land called *N.* and *W.*) were answered to the King before and at the time of the said letters patent. It was held that although there was a certainty in the thing granted, in the names, in the contents, in the town, in the county, tenant, and in the title, yet the *quæ quidem* being false, avoided the patent, for that the clause *quæ quidem* was in law a suggestion of the patentee. That case took a distinction which is well warranted by the older authorities, and declared that "*ex certa scientia* imports that the King had knowledge of the thing he granted. And that *ex mero motu* properly imports the honour and bounty of the King, who rewards the patentee for the merits of his service, and of his own mere motion, without any suit of the

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(m) 1 Co. Rep. 43 a.

(n) 5 *Id.* 93.

(o) Sir John Davis' Rep. 29.

(p) 10 Co. Rep. 109.

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party." Where, therefore, the grant used these forms, it would be valid; but where, as in this case, the grantee gave the information, the grant would be void if that information was not correct. In *Sawyer v. East* (q) the same doctrine is very fully explained, and among many others, two illustrations are given which are very decisive. It is said, if an abbot makes a lease for sixty years, and the lessee demiseth to *J. S.* for eighty years, the reversion comes to the Queen; the sixty years expire, the second lessee surrenders to the Queen the twenty years, which in substance he had not, in order that the Queen might re-grant him the twenty; this falsehood avoids the grant, though the lease did not require to be recited. And again, if a patent says there was a surrender, when in truth there was none, the patent is void. *Jenkin's Eight Centuries* (r), citing 17 Ed. III., and *Stamford* 61, fully explain the principle of this doctrine. The modern case of *Alcock v. Cook* (s) has recognised and established it.

Then again this grant is inadmissible to prove a title in the Bishop, for it is wholly uncertain. It does not state which of the fifteen livings are to belong to the Bishop and which to the citizens of *London*. And finally, this rectory cannot come within the grant, for the words of the grant are "rectories, &c., belonging, appertaining, appendant, or incumbent." This is a living in gross, and the words of the grant do not apply to it. Nor is it shewn by the supposed grant that at the time of making it the Crown had any existing interest to be affected by it; that alone would render it invalid. Now the grant was tendered in evidence for the specific purpose of shewing an admission by the Crown in favour of the Bishop; viewed in any way whatever it does not shew any thing of the kind, and therefore it is not admissible. (The Lord

(q) Lane, 108.

(s) 5 Bing. 340.

(r) Century 7, case 77.

Chancellor.—Counsel may insist on the admissibility or non-admissibility of documents for a particular purpose, but that will not necessarily govern the opinion of the Judge, who is not bound to say that it is or not admissible for the particular purpose for which it is offered; but who may yet think it admissible.) But here the Court expressly admitted this evidence on the specific ground on which it was tendered,—if it is not admissible on that ground, the judgment must be reversed.

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The letters from the King to two successive Bishops of *Derry* on the subject of releasing them from first fruits, and requiring them to perform the covenants in the grant are of no value whatever: they were mere acts of grace on the part of the Crown, and can have no effect in proving title. They ought not to have been admitted.

The returns to the writs are not admissible, for though it may be said that they were made by a public officer in the discharge of his duty, yet they are taken out of the general rule applicable to such a case, because that public officer had a private and individual interest. These returns set forth certain collations by the Bishop, but mere collation by a Bishop does not shew that he collated in any other character than as diocesan, *The Bishop of Meath v. The Marquis of Winchester* (t), his act therefore may be quite consistent with the right of the patron. To shew his title, therefore, the Bishop who was collating would have an interest in stating dates which would be favourable to that title, and would exclude the patron. That interest prevents the Bishop's returns from being admissible in evidence.

The First Fruits' books are not admissible: the first objection to them is, that they are tendered for a purpose distinct from and collateral to that for which they were issued. The purpose for which they were issued had relation only to the revenues of the Crown. Those revenues would be payable from any holder of a living, whether he

(t) *Ante*, Vol. IV., p. 445.

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was in by right or through usurpation, they have nothing to do with the right of presentation or collation, and cannot be used to shew in whom that right exists. The *King v. Walpole* is in point here. But there is yet another objection: the fact that the return is made by a public officer does not render it admissible. The return of the sheriff on a warrant to arrest has been held not admissible to shew the time and place of an arrest, such time and place having become important with relation to a question under the bankrupt laws, *Chambers v. Bernasconi*. (u).

The returns are not admissible for another reason; they are tendered as returns made by a public officer in obedience to the King's writs, but they contain matters which the writs did not require the Bishop to return; they exceeded the exigency of the writs by giving the names of incumbents, and even returning vacancies which had occurred since the writs were issued; they set forth collations to other livings besides that of *Camus*, and they amount, in fact, to a general allegation of title on the part of the Bishop; they do not therefore fall within the description of *bona fide* returns made by a public officer in the discharge of his duty, and are consequently inadmissible. They do not bear the character of acts done by a public officer in the discharge of a public duty, and to permit them to be used for the purpose now proposed will be to allow any Bishop to make evidence for himself and his successors. Now in *Short v. Lee* (v), the Master of the Rolls expressly declared that no other proprietor or corporation sole, except a rector or a vicar, could make evidence for his successors, and even in those cases the liberty seems to have been allowed with regret by the Courts.

The First Fruit books are not public books. In *Merrick v. Wakley* (w), a register of medical attendances, kept

(u) 1 Crom. & J. 451; 1
Crom., Mee., & Ros. 347.

(v) 2 Jac. & W. 464, 478.
(w) 8 Ad. & El. 170.

under the statute by the officer of a poor law union, was offered in evidence, to show the manner in which the plaintiff had, as a surgeon, treated a pauper committed to his charge. It was rejected because it was not a public book. On a similar ground, in the *King v. Debenham* (x), the entry in a parish book by a former parish officer of a parish certificate, was rejected.

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As to the triennial visitation books, it must, perhaps, be conceded, after the case of *Arnold v. The Bishop of Bath and Wells*, that in one respect they are admissible; but they are not admissible in this case for the purpose for which they were here tendered. The visitation books speak of collations: the collations themselves, if produced, would not be evidence for this purpose, for the act of collation does not prove a title, *The Bishop of Meath v. Marquis of Winchester* (y); for where there is a patron, the Bishop, in collating, is merely *negociorum gestor*; *Gibson* (x); and consequently the books in which collations are merely recorded, cannot be any evidence of title. These arguments apply equally to all the instances of collations by the Bishop.

It is submitted, therefore, that the case of the plaintiffs was fully made out, and that the evidence tendered on the other side was not receivable. As that evidence was received, and there has been a verdict upon it, there ought to be a *venire de novo* awarded.

The *Solicitor General* and Mr. Sergeant Channell (Mr. *Vaughan Williams* was with them) for the defendant in error: The only real question here is, whether these documents were admissible in evidence. The purpose for which they were offered cannot now be the subject of discussion. (Lord Brougham.—The purpose for which a document is tendered in evidence cannot enter into the question of its admissibility.) It cannot. And in this

(x) 2 Barn. & Ald. 185.

(x) Codex, 813, n.

(y) *Ante*, Vol. IV., p. 445.

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case there is no exception taken to the manner in which the evidence was left to the jury. *Legat's* case and the other authorities cited on this point, are inapplicable here; for if there was an untrue representation made to the King at the time he executed this grant, the argument would be, not that the grant was not admissible in evidence, but that it did not prove what was asserted. In *Legat's* case the document was admitted, and it was afterwards found by the jury that the recited therein was false. If that was so here, the jury ought to have been asked to find that fact. But it was not so; for the right and custom of the Bishop to grant and collate, does not appear to be there rested solely on the information given by the Bishop, but on "the custom thereof lately taken in the Kingdom of Ireland." It is impossible to see on what ground it can be argued that the letters patent of the Crown are not admissible in evidence, unless it can be said that letters patent of the Crown are not evidence at all of any matter in dispute. Such a doctrine can never be contended for. If the circumstances stated there were not true, they might have been contradicted; but the document was clearly admissible in evidence.

Then as to the objection that these documents were not enrolled in *Ireland*; that objection is cured

done to which the Crown and the Bishop were parties were admissible in evidence at all. It is clear that this surrender and this grant may be taken together, and so constitute evidence of title of the strongest kind.

There is no objection to the grant on account of its being contradictory to the agreement of 1609; it does not appear that *Camus* was intended to be included in that agreement, and no trust could arise on the part of the Crown. In whatever way trust lands come into the possession of the Crown, they are held by the Crown discharged of the trust.

Then as to the returns, the objection to them is, that they contained matters which were beyond the Bishop's authority, and were not required by the exigency of the writs. On this objection the case of *Chambers v. Bernasconi* was referred to. That case has been misapprehended,—in the first place, that was not the return of the sheriff to the Crown, but of the officer to the sheriff. The sheriff was not bound in his return to shew the time and place of the arrest; all that he had to do was to return that on the day fixed for the return of the writ he had or had not the body of the defendant. The statement of the time and place being therefore a matter not connected with the performance of his duty, was not admissible. But here the writ commanded the Bishop to make return of how many and what “promotions spiritual, of what name, nature, or quality soever” had been relinquished, &c., within a stated period, and “how many and what deans, &c., had been admitted, collated, or inducted, and by what names and surnames they had been so admitted, collated, and inducted, together with the day and year thereof, and in what counties within your diocese the said dignities are situated.” In obedience to this command, the Bishop was compelled to make these detailed returns, and the details having been thus called for from him, and having been made by him in his character of

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Bishop, in obedience to the King's writ, they become evidence as the returns of a public officer made in a public matter. The case of *Middleton v. Melton* (a), does not shew that an entry to be receivable must have been made by a person who had no interest in the matter, but that if made against the interest of the party making it it is receivable, *Ford v. Grey* (b). It was because this was not the case in the *King v. Debenham* (c), that the entry there was rejected. And in *Merrick v. Wakley* (d) the principles of the former cases were adopted, and it was said that in the cases of the registers of the Navy Office, the log of a ship of war, and the books of the Master's Office, all of which are admissible, "the entries are made by an officer in the discharge of a public duty, they are accredited by those who have to act upon the statements, and they are made for the benefit of third persons." That is so here; the returns are for the benefit of the Crown and not of the Bishop, and the principle thus clearly stated applies to the present case and makes those returns evidence.

The arguments as to the admissibility of the returns, apply equally to the visitation books, and so they do to the books and entries from the First Fruits' Office. All these were entries made in the discharge of an ordinary public duty, and were receivable in that character.

The letters from the King are at least admissible as recognitions by the Crown of the grant which it had previously made.

Throughout the argument for the plaintiffs in error, the admissibility of a document has been confounded with its value in proof, and without contesting the authority of the cases cited, it may be confidently contended, that they are inapplicable. The judgment of the Court below must be affirmed.

(a) 10 Barn. & Cr. 317.

(b) Salk. 285.

(c) 2 Barn. & Ald. 18.

(d) 8 Ad. & El. 170.

Sir *T. Wilde* replied.

The *Lord Chancellor* put the following question to the Judges:—"Adverting to the record and proceedings in this case, ought the exceptions therein stated, or any, and which of them, to have been allowed?"

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Lord Chief Justice *Tindal*, on behalf of the Judges, asked for time to consider the question, which was granted.

Lord Chief Justice *Tindal*, died on the day before the Judges were called in to deliver their opinions.

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Mr. Baron *Parke*, therefore, as senior Judge, delivered their opinion, which was as follows:—

The question proposed by your Lordships is, whether, adverting to the record and proceedings in this case, the exceptions therein stated, or any and which of them, ought to have been allowed. In answer to that question, I have to state that the unanimous opinion of the Judges who heard the argument at your Lordships' bar is, that none of the exceptions was valid in law.

These exceptions, twelve in number, were all made to the admissibility of evidence on the trial of a *Quare impedit* for the rectory of *Camus*, in the county of *London-derry*. The declaration contained several counts, stating the title of the plaintiffs in different ways. There were several pleas, and it is immaterial to notice them or the counts in detail. The important issue was, whether the plaintiffs were seised of the advowson of the rectory of *Camus* as an advowson in gross: and the evidence which is questioned, was offered by the defendant as applicable to that issue. The plaintiffs gave many documents in evidence in support of their title; the most important were an inquisition, and articles of agreement, and a grant from King *James I.* The inquisition was taken in

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obedience to a royal commission directed to the Bishop of *Derry*, amongst others, on the 30th August, 1609, at *Lymavaddy*, and it was thereby found, that the patronage of all advowsons of churches in the county of *Coleraine* (afterwards *Londonderry*), of right belonged to the King in right of his Crown. The articles of agreement were dated 16th January, 1809, and were between the Lords of the Privy Council of King *James I.* and the citizens of *London*, for a plantation in the province of *Ulster*, whereby the citizens agreed to advance money and to undertake the plantation, and on behalf of the Crown it was agreed that they should have the patronage of all the churches in *Derry*, and the town of *Coleraine*, and in all the lands to be undertaken by them.

The letters patent were dated the 29th March, 1613. They granted to the plaintiffs several different estates, and, *inter alia*, the patronage of all the churches in the city of *Derry* and village of *Coleraine*, and the advowsons of several places named, including that of *Canus*.

The defendants, in support of their case, offered in evidence:—first, a surrender (unconfirmed by the dean and chapter) by Bishop *Montgomery* to King *James I.*, of the rectory of *Derry*, all parsonages in the county of *Coleraine*, and the ferry at *Derry*, to be disposed of at the King's good will and pleasure. This surrender was dated the 1st August, 1610.

This document was objected to, but received; and its reception forms the subject of the first exception.

If this evidence had stood alone, and had not been followed up by that of a grant on the 3d of August, 1610, from King *James the First* to Bishop *Montgomery*, it would have been, to say the least, doubtful whether it was properly admitted; but in connexion with that grant we think it was admissible, for a reason which applies to both.

The second exception was to this grant. It was a grant under the Great Seal of *England* to Bishop *Mont-*

gomery of various lands, including lands in *Camus*, of all the advowsons belonging and appertaining to them, and to the same Bishopric belonging and appertaining, as to which the Bishops were heretofore accustomed to collate, as appeared by the survey then lately exemplified, which exemplification is dated at *Dublin* the 26th *January*, 1609, except certain advowsons particularly named, not including that of *Camus*, and excepting nine out of fifteen in the county of *Coleraine*, which, by mutual consent of the citizens of *London* and of the Bishop, were to be transferred from the Bishop to the citizens, and a provision is made how the nine should be selected. The patent contains a covenant by the Bishop of *Derry*, that, with the consent of the chapter, he should make further assurances to the Crown of the excepted premises, and amongst others of the ferry and water of *Derry*.

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To the admission of this document the second exception was made. The document was offered, as showing an admission on the part of King *James* the First, that the living of *Camus* did anciently belong to the Bishop of *Derry*: it was objected to, that it was not admissible for the purpose aforesaid; and the Court decided, as stated on the record, that the document so offered for the purpose aforesaid, was legally admissible.

According to the strict construction of the decision of the Court, so stated, it was not ruled that the document was admissible *for that purpose*, but only that it was admissible; and if admissible on any ground, the exception must be overruled. A court of error can only look at the record, and decide upon the propriety of the ruling of the Judge or Court below, as therein stated.

We are all of opinion that the two documents, the surrender of *August* 1st, 1610, and the patent of *August* 3d, 1610, were admissible. The proximity of the dates, the circumstance that the surrender is of the advowsons to be at the disposal of the Crown, that the Crown grants *all*

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advowsons belonging to the lands, and to the Bishopric belonging and appertaining, the reference in the grant to the ferry mentioned in the surrender, are all circumstances tending to show the connexion between the two instruments; and if the jury should find them to be connected, the grant founded on the surrender, and made in pursuance of it, is an act of the Crown at variance and inconsistent with the finding in the inquisition of *Lymavaddy* (which is the main foundation of the plaintiffs' case), that all the advowsons in the county of *Coleraine* then of right belonged to the Crown; and consequently is matter for the consideration of the jury to disprove that finding; for the finding is evidence merely, but not conclusive, of the fact so found. The implied acceptance of the surrender by the Crown of advowsons in the county of *Coleraine* as belonging to the see of *Derry*, and the making a bargain with the Bishop touching advowsons, in consequence of it, by a proper instrument binding on the Crown, (for the patent is put on the footing of a patent under the great Seal of *Ireland*, by the *Irish* statute 35 *Geo. III. c. 39.*) is an act of the Crown, leading to the inference that it had no prior title of its own to all the livings in *Coleraine*, and like every other act or conduct of the Crown, raising an inference material to the issue, is receivable in evidence against the Crown, and all who claim under it by a subsequent conveyance, and who therefore have only such title as the King had when he made that conveyance.

We are not called upon to decide whether the recital in the grant, that the Crown had been informed that there were fifteen advowsons in *Coleraine*, anciently belonging to the Bishop, was evidence against the Crown, as an admission of the truth of the fact; because we cannot collect from the record that the Court so decided. All we are bound to determine is, whether the documents were admissible. We think they were: indeed the act done by

the Crown, being in the nature of an admission that some of the livings in the county of *Londonderry* had belonged to the see, and *Camus* being a living in that county, may be said to have been receivable in evidence for the purpose of proving an admission of King *James*, that *Camus* anciently belonged to the Crown:—the purpose for which it was offered.

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But it is said that at the time of this transaction, the Crown had already bargained for a valuable consideration, by the articles of January 1609, to give these advowsons to the City of *London*; and that any admission of the Crown of a subsequent date, by conduct or otherwise, would not be admissible, as the Crown was, after the articles, only in the nature of a trustee. Supposing that the objection was well founded (upon which it is unnecessary to give any opinion), and that the declarations of a trustee who has only the legal estate, the whole beneficial interest being in another, are not admissible against a person claiming that estate under him, it would not apply to this case. The King was not, and could not be a trustee, nor had he covenanted to convey anything, nor the Lords of Council agreed to convey the living of *Camus* in particular, or all the advowsons in the county of *Coleraine*, but only that of *Derry*, and those in the town of *Coleraine*, and those in the lands to be undertaken by the city; and whether the lands in which *Camus* was were undertaken before the grant of 3rd of August, 1610, does not appear. We are therefore clearly of opinion, that the articles of agreement do not prevent the subsequent act of the Crown from being receivable in evidence.

The third and fourth exceptions were to the admissibility of two letters under the Privy Seal, discharging two of the succeeding Bishops of *Derry* from first-fruits, and directing the bishop and dean and clergy to perform the covenants and directions in the former letters patent mentioned on the part of the Bishop of *Derry*. These are

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both admissible, on the same ground as the letters patent, and as recognizing the bargain with the Bishop therein contained.

The fifth exception related to an entry in one of the books of the First Fruits' Office, of the collation and admission of *John Freeman* to the rectory of *Camus*. Writs were issued from the Court of Exchequer to the Bishops, to ascertain the value of the first fruits and twentieths, and returns were made by the Bishops. Search for the writs and returns was made, and the book was offered as secondary evidence of returns.

We think the entry was properly received. The writs related to a public matter, the revenue of the Crown, and the Bishops, in making the return, discharged a public duty, and faith is given that they would perform their duty correctly: the return is therefore admissible, on the same principle on which other public documents are received. It was contended that the Bishop could not be permitted to make evidence for himself, and therefore that the entry, though admissible between other parties, was not to be received for the Bishop; and the case was compared to an entry in the book of a union, of a surgeon's attendance, *Merrick v. Wakley* (e), and the receipt of a certificate in a parish book, *Rex v. Debenham* (f), which have been rightly held to be inadmissible for the surgeon in one case, or the parish keeping the book in the other.

But neither of these was an entry of a public nature, in the proper sense of that word; the former was a memorandum, intended to operate as a sort of check to the surgeon, the latter a memorandum for the parish officer, concerning merely the particular parish and its rights, with relation to another.

In public documents, made for the information of the Crown, or all the King's subjects who may require the

(e) 6 Ad. & El. 170.

(f) 2 Barn. & Ald. 187.

information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not. A marriage or burial register would certainly be admissible to prove a marriage or death, in suits to which the clergyman who made it might happen afterwards to be a party, though he had a pecuniary interest in the particular marriage or death at the time. The observation, that it might have been fabricated to advance the interests of the officer, affects the value of the evidence, not its admissibility; and may be offered with more or less effect, according to the degree of interest in the officer, and the proximity of time between the entry and the suit, and other circumstances.

The same observation which I have made on the fifth, applies to the sixth and seventh exceptions.

The eighth exception was to the admissibility of part or the whole of the return of a writ from the Exchequer, returned into the office of the First Fruits.

The return stated the vacancy of *Camus* by the death of *Walter Forrest*, and the collation of one *Breviter* on September 4th, 1716; the cession by *Breviter*, and collation of *Daniel*; and the institution of *Faning* and another to other rectories in the county of *Derry*, and the collation of others.

It was objected that no part of this return was admissible. The part relating to *Camus* was, however, clearly so; for it showed two collations to that rectory. It was then objected that the remainder was not receivable; but it was answered that the whole was one official act, and the jury might look at the whole in order to explain and authenticate the part relating to *Camus*. And we think this was rightly done. The value of the return as an accurate document must depend upon looking at the whole of it; and the context shows that the term "collation" was used in its proper sense.

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The ninth exception stands on precisely the same footing.

The tenth was somewhat different.

A *Frist Fruits' Writ* of the 38 *George III.* was offered, directed to the Bishop of *Derry*, by which the King requires to be certified what deans, &c., rectors and vicars have been admitted, instituted, collated, or inducted to dignities, benefices, &c., and by what names; together with the day and year of the institution or collation of each, and the county where the dignities, &c., are situate; and the command of the writ was, that the Bishop having searched his registry and archives touching the premises, whatever he should then find he should return into the Court of Exchequer on parchment, reduced into proper form, without any omission whatever.

The return by the Bishop was, that having searched the registry of *Derry*, and the archives thereof, he found "all whose names are in the schedule written to have been collated and instituted;" and the schedule stated seven collations to different livings (one to *Camus*, and that was said to have been made on the 2d of *June*, 1797, in the room of a former incumbent, who held the same for ten years and twenty-seven days from the 5th of *May*, 1787, and vacated the same by resignation on or about the 2d *June* aforesaid); and similar statements were made as to the others; and the objection to this return was the same as to the others, with this addition, that the former state of the living was not inquired into by the writ, and therefore that part of the return was not an authentic official act pursuant to the writ, and so was inadmissible; that it was a very material part, as it showed the collation to have been made immediately after the vacancy, and consequently that it was not made by lapse, but *pleno jure*; and it was argued that as the Court admitted the whole of the return, and held that the whole ought to be taken into consideration by the jury, the ruling was erroneous.

Supposing that the Judges had held these parts of the

return, as to the former state of the living to be admissible as proof of the truth of those facts (which it does not appear that they did), it is enough to state that we think that the answers of the bishop in this respect were within the scope of the inquiry of the writ; for it asks for what is contained in the registry and archives, and it is to be inferred from the return, that all the matters therein stated were in the registry and archives. This exception was therefore properly overruled.

The eleventh exception stands on precisely the same footing as the tenth.

The twelfth was an exception to the receipt of the original collation, produced from the registry of *Derry*, of *Thomas Richardson* to the living of *Camus*, dated 23d June, 1841, and made *pleno jure*.

No valid objection can certainly be made to this part of the evidence. The original document was produced, and was the best evidence of it, and proved an act of possession of the advowson on the part of the bishop, and was consequently evidence on the question of the plaintiff's title.

I have therefore humbly to state to your Lordships, that the Judges are all of opinion that none of the exceptions ought to have been allowed.

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Lord Lyndhurst.—My Lords, in moving the judgment in this case, I cannot help recalling to your recollection, that you were assisted in the argument by the then Chief Justice of the Common Pleas, Sir *Nicholas Tindal*. We have this morning received information of the death of that most excellent and eminent individual. A more upright, learned, and able Judge never adorned the seat of justice. A more able and excellent individual in all the relations of life never existed. I should have done injustice to my own feelings, if I had not upon this oc-

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I pass from this sad subject to the question now before this House. I attended the argument, and had an opportunity of consulting the learned Judges, during the progress of various points that occurred. I prepared the consideration of the Judges, which was taken by the House. The opinion which has now been given by their Lordships exhausts the whole subject; and I beg leave to state, that I entered into much consideration, in the view then taken; and I shall, therefore, with your Lordships' consent, propose that the judgment of the Exchequer in *Ireland*, affirming the judgment of Common Pleas there, be affirmed, and will

Lord *Brougham*.—I entirely agree with my learned friend in the view he takes of this subject. My mind goes along entirely (as it did during the argument of the counsel at the bar) with the view which the learned Judges have come to, in the result of their and satisfactory opinion which we have now received. The conclusion which I had indeed arrived at in the course of the argument at the bar.

The main error which ran through the argu-

for which evidence was tendered and admitted, with the admissibility of that evidence. The evidence tendered to prove any point may be perfectly inadequate to prove that point. It may be such that if the learned Judge put it to the jury, as sufficient proof, his direction to them upon that point might well be a subject of exception. Yet the same evidence might be perfectly well admitted and received for such purposes to which it was strictly and correctly applicable.

Now that applies to many of the arguments that were urged upon several of those exceptions ;—it applies to the eighth as well as to others of the exceptions, in this way, that, for instance, the eighth exception goes to the admissibility of a document. Now it was admissible past all doubt as to the living in question,—*Camus*. Then suppose that admissibility had not opened the door to receiving that document generally in the case, but that it was to be confined to showing other matters for which it had not been produced, or in respect to which it might not be received in evidence ; still if the document is to be received in evidence as to *Camus*, it is past all doubt,—as the learned judges have by their opinion given us to understand to be their view, and justly,—it is past all doubt that the whole matter might well go before the jurors in order to make up their minds upon its effect after the evidence should be so received. Here, again, is to a certain degree, the same error of confounding the use to be made of the evidence, or its applicability to the purposes for which it is produced, with the admissibility of the evidence itself. Suppose that in a cause at Nisi Prais, the defendant produces a letter under my hand ; that letter is received in evidence, though it may be very true it does not prove the fact for which purpose the defendant put it in. If the Judge refuses to receive it, his direction is liable to be excepted against for that refusal. If he receives and states erroneously to the jury that it proves the point which it

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amiable, honourable, and virtuous individual, I never knew. I never had the good fortune to be connected, as my noble and learned friend was, with him in official life, but I had the great honour and advantage, which might have been turned to more account by me, but which I still deem a high privilege, and which now leaves only a painful recollection,—I had the honour and singular advantage of having been one of his pupils before I was called to the bar, when he was an eminent special pleader. I cannot trust myself to say anything more.

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Sir *Fitzroy Kelly*.—On behalf of the defendant in error in this case I have to ask your Lordships for a certificate of the Speaker of this House, that the defendant had good grounds for defending the writ of error in this case. Your Lordships are aware that under the 8th and 9th of *Victoria*, c. 51, provision is made for enabling Bishops who shall reasonably and properly incur costs in respect of any advowson or church preferment, to charge the living with those costs. It is true, that in this case your Lordships have affirmed this judgment with costs. But I am told that there are still costs, commonly known as extra costs, to a very large amount indeed, which have been reasonably and necessarily incurred by the Bishop in this case, beyond any which the law will enable him to recover against the plaintiffs in error. And it is for the purpose of enabling the Bishop, under the terms of this act of Parliament, to charge his see with those costs that I solicit at the hands of your Lordships, this certificate.

Lord *Brougham*.—That can apply only to extra costs between the decision in the Court of Exchequer Chamber and the present decision; we cannot certify to any thing further.

Sir *Fitzroy Kelly*.—The law will give effect and put a proper interpretation upon your Lordships' certificate.

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All that I ask of your Lordships is a certificate from the hands of the Speaker of the House of Commons that there was good ground for such writ of error.

Lord *Lyndhurst*.—It is perfectly right that a certificate should be given.

Lord *Brougham*.—*Valeat quantum*. We are of opinion as to the extent to which it operates.—[The question of law.]

Judgment affirmed with costs.

■ THOMAS MAUNSELL WILSON - *Plaintiff in error.*
 ■ JOHN LOVELAND, Lessee of the }
 ■ Rev. J. W. FORSTER - } *Defendant in error.*

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The 3 & 4 W. 4, c. 37, s. 124, empowers the Lord Lieutenant and Privy Council in *Ireland* to "disappropriate, disunite, and divest any rectory, vicarage, tithes, or portions of tithes, and glebes, or part or parts thereof, from and out of any archbishopric, bishopric, deanery, or archdeaconry, dignity, prebend, or canonry, and to unite every such rectory, vicarage, tithes, or portions of tithes to the vicarages and perpetual or other curacies of such parishes respectively, so that each such rectory, vicarage, tithes, or portion of tithes, and glebes, or part or parts thereof, shall with its respective vicarage, perpetual or other curacy, form a distinct parish or benefice:—"

Rectory.
Tithes. Glebe.
Disappropriation.

Held, that the Lord Lieutenant and Privy Council have authority to disappropriate any part or portion of the tithes of a rectory: That the word "rectory" in the statute must be applied in its widest legal sense, and therefore includes the glebe; and that an order of disappropriation of "Rectory," made by the Lord Lieutenant and Privy Council, can not be restricted to the tithe rent charge, unless on the face of the order of disappropriation such restriction is manifested.

In an order of the Lord Lieutenant and Council, made under this act, there was a statement of the revenues of three rectories belonging to a cathedral treasurership. The order then went on to say, "There is a further income belonging to the said treasurership, arising from demised lands, amounting to the yearly sum of 80*l.* 6*s.* 1½*d.*" The glebe lands which were not in express terms mentioned in the order, did amount to nearly the sum thus stated. A small piece of land called the treasurer's garden made up the rest. After this statement of the revenues, the order went on to disappropriate "the rectories, together with the rectorial tithes thereunto belonging," in pursuance of the power given by the act, but said nothing about the glebe:—

Held, that the glebe lands were, under this order, disappropriated from the treasurership.

—◆—
 THIS was an action of ejectment to recover certain lands situate in the parish of *Emly Grennan*, in the county and

the latter related to the management of the funds. The corpus of the Treasurership Rectory of *St. Patrick*, having within its jurisdiction, called *St. Patrick*, otherwise *Kilpatrick*, the rectories or parishes of *Cahirvalla* and *Cahirvalla*. These several rectories constituted a Union of *St. Patrick*.

By an indenture of lease bearing date the 1st of March, 1813, made between the Reverend *T. Quinn* of the one part, and the Dean and Chapter of the Cathedral of *St. Patrick*, of the other part, *Quinn* demised to the Dean and Chapter a plot of ground situated in the parish of *Mary's, Limerick*, and known by the name of the Treasurer's Garden, for a term of forty years, from the 25th of March, 1813, at the rent of 2*l.* per annum, in ready money, present *Irish* currency.

By another indenture of lease dated the 1st of March, 1824, made between the Reverend *T. Quinn* of the one part, and *M. Wilson* (the now plaintiff in error) of the other part, *Quinn* demised to *Wilson* the glebe land of the Rectory of *St. Patrick* for the term of twenty years, from the 25th of March, 1824, at the yearly rent of 1*s.* 6*d.*, present *Irish* currency.

By another indenture of lease, bearing date the 1st of March, 1835, made between *Quinn* of the one part, and *M. Wilson* of the other part, *Quinn* demised to *Wilson* the glebe land of the Rectory of *St. Patrick* for the term of twenty years, from the 25th of March, 1835, at the yearly rent of 1*s.* 6*d.*, present *Irish* currency.

the time of his death. That event occurred on the 22nd of *January*, 1841, and thereupon the dignity of the Treasurership became void.

The Bishop of *Limerick*, in whom was vested the patronage or right of appointment to the treasurership, gave, to the ecclesiastical commissioners, notice in writing of the vacancy of that office. He did this under the provisions of one of several statutes passed to regulate ecclesiastical preferments and revenues in *Ireland*. These statutes are fully referred to in the order in council made by the Lord Lieutenant soon after the announcement of Mr. *Quinn's* death.

On the 20th *February*, 1841, and while the office or dignity of the Treasurer was still vacant, his Excellency the then Lord Lieutenant of *Ireland*, by and with the advice of the Privy Council, made an order to the following effect :

“ By the Lord Lieutenant and Council of *Ireland*,
 EBRINGTON.—Whereas by an Act of Parliament passed in the third and fourth years of the reign of his late Majesty King William the Fourth, cap. 37, intituled, ‘ An act to alter and amend the Laws relating to the Temporalities of the Church in *Ireland*,’ it is (s. 124 (a)) amongst other things enacted, That it shall and may be lawful for the Lord Lieutenant, or other chief governor or governors of *Ireland*, for the time being, and his Majesty’s Privy Council there, in the case of the Deaneries of *Down* and *Raphoe*,

(a) The preamble of that section recites “ That whereas several parishes, or the tithes or portions of tithes, and glebes thereof, are appropriated or united to certain archbishoprics, bishoprics, deaneries, archdeaconries, dignities, prebends, or canonries ; and it is expedient that the same should be disappropriated, disunited, and divested out of such archbishoprics, bishoprics, deaneries, archdeaconries, dignities, prebends, or canonries, and vested in the respective vicars or curates discharging the duties of the parishes in which the said benefices, tithes, or portions of tithes are respectively situate,” and it then proceeds to make the enactment embodied in the order.

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canonry shall be void, to disappropriate, vest any rectory, vicarage, tithes, or port glebes, or parts or part thereof, from Deaneries of *Down* and *Raphoe* respectively out of any archbishopric, bishopric, and archdeaconry, dignity, prebend, or canon any such rectory, vicarage, tithes, or port the vicarages and perpetual or other c parishes respectively.

“ And whereas by another Act of Parli the fourth and fifth years of the reign of Majesty, cap. 90, intituled ‘ An act to amend the third and fourth years of the reign of Majesty, intituled, An act to alter and amending to the temporalities of the Church amongst other things enacted, That where act, or any other act, any parish in which any perpetual curate endowed, shall be disunited from any ecclesiastical dignity curate shall immediately upon such disunion, and by virtue thereof, be and be vicar, as the case may be, of the parish so or disunited, and such perpetual curacy shall said rectory or vicarage.

“ And whereas by a further act passed

Fourth, as empowers the Lord Lieutenant and Council to unite and annex any parish, tithes, or portions of tithes, or glebes, so as by the said act disunited, to any neighbouring rectory, vicarage, or perpetual curacy, is by the said act of the third and fourth years of her Majesty, declared to be and the same is hereby repealed. And it is by the said last mentioned act enacted, that in lieu of uniting and annexing any parish tithes, or portions of tithes, or glebes, so disunited, to any neighbouring rectory, vicarage, or perpetual curacy, it shall be lawful for such Lord Lieutenant and Council, if they shall not think fit to erect the same into a separate benefice or parish, to order and direct that such parish, tithes, or portions of tithes, or glebes, so disunited, shall be transferred to the ecclesiastical commissioners for *Ireland*, and the right and interest in and to the same, and all arrears thereof, shall thereupon vest in the said commissioners, and be by them carried to the general fund under their administration, after making thereout such provision, if needed, for the due performance of the occasional duties of such parish or place as the said commissioners may think fit. And whereas the treasurership of the Cathedral church of *St. Mary's, Limerick*, in the diocese of *Limerick*, is now vacant, and it appears from the report of the commissioners on ecclesiastical patronage and revenue, that the corpus of said treasurership consists of the rectory of *St. Patrick* having within it a perpetual curacy called *St. Patrick's*, alias *Kilquare*, and the rectories of *Cahirvalla* and *Emly Grennan*, with cure of souls, the said several parishes or rectories constituting the Union called the Union of *St. Patrick*; that the revenues of said parishes or rectories respectively, under the act of the first and second years of the reign of her present Majesty, cap. 109, intituled 'An Act to abolish Composition for Tithes in *Ireland*, and to substitute Rent Charges in lieu thereof,' are as follows, namely—

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1846.	1. <i>St. Patrick's</i> Rectory rent charge . . .	£256	3	0
WILSON	2. <i>Cahirvalla</i> Rectory rent charge . . .	157	10	0
v.	3. <i>Emly Grennan</i> Rectory rent charge . . .	112	10	0
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		£526	3	0

That there is a further income belonging to the said treasurership arising from demised lands, amounting to the yearly sum of . . . £80 6 1½

“Now we, the Lord Lieutenant and Privy Council, having maturely considered the circumstances of the said treasurership of *St. Mary's, Limerick*, and the last mode for providing for the interest and convenience of the said several parishes or rectories forming the corps thereof, do hereby, in pursuance of the powers vested in us by the said hereinbefore first recited acts, order and direct that the said parishes or rectories of *St. Patrick*, together with the rectorial tithes thereunto belonging, be, and the same are hereby disappropriated, disunited, and divested from and out of the said treasurership of *St. Mary, Limerick*, and united to the said perpetual curacy of *St. Patrick*, alias *Kilquare*, erected as aforesaid within the said parish or rectory of *St. Patrick*.

“And we do hereby further order and direct, in pursuance of the hereinbefore last recited act of the third and fourth years of her present Majesty's reign, that the said parishes or rectories of *Cahirvalla* and *Emly Grennan*, and the tithes thereunto belonging respectively, be, and the same are hereby disappropriated, disunited, and divested from and out of the said treasurership of *St. Mary, Limerick*, and transferred to the ecclesiastical commissioners for *Ireland*. Given at the Council Chamber in *Dublin*, the 25th day of *February*, 1841.

(Signed) “*Charles Meath, Charles Kildare, Stephen Cashel, John Radcliffe, A. R. Blake.*”

The sum of 80*l.*, referred to in the said order, was composed of the three rents reserved by the three leases already mentioned, and of 1*l.* 16*s.* 11*d.* (present *Irish* currency), the rent for the *Treasurer's Garden*, demised to the Dean and Chapter.

On the 20th *March*, 1841, the Rev. *Robert Knos* was duly collated and installed into the office of the said treasurer, and discharged its duties until the 16th *October* in that year, when he was presented to the prebend of *Munchin*, in the diocese of *Limerick*, and the office of the treasurership thereby being void. Notice of the vacancy was duly given to the Bishop and the ecclesiastical commissioners, on the 19th of *October*, 1841. On the 19th *March*, 1842, the Rev. *James William Forster*, the lessor of the defendant in error, was installed into the said office under the appointment of the bishop.

On the 29th *September*, 1842, the sum of 55*l.* 7*s.* 8*d.* being one year's rent arising after the appointment of Mr. *Foster*, became due under the lease of the 25th *July*, 1835, and that sum was on the part of Mr. *Forster* demanded from the plaintiff in error, but he refused to pay it, on the ground that by the Order of the 25th *February*, 1841, the lands of *Emly Grennan* had been disappropriated and disunited from the said treasurership and transferred to the ecclesiastical commissioners, and that therefore Mr. *Forster* had not, as the treasurer, any right to the rent reserved under that lease. Mr. *Forster* thereupon brought an action of ejectment. The cause was tried before Mr. Justice *Jackson*, at the spring assizes for *Limerick*, in 1843, and a special verdict was returned, finding all the facts already stated subject to the opinion of the court on the law as applicable to them. The cause was afterwards argued in the Court of Exchequer, upon two points, first, whether the statutes gave to the commissioners the power to disannex a part or portion of the treasurership, and, secondly, whether they had, by the terms of the order, disannexed the rent charges alone. Judgment was given for the plaintiff in the ejectment (*b*). Mr. *Wilson* thereupon brought a writ of error in the Court of Exchequer Chamber, where the cause came on for argument, on the 13th *November*, 1844, and the court (Mr. Justice *Crampton* dissenting

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on both points) affirmed the judgment (c). Mr. *Wilson* then brought a writ of error to this House.

Sir *F. Kelly* and Mr. *Barstow* for the plaintiff in error. The special verdict shews that in fact the lands for which the ejectment is brought, are the glebe lands of the rectory of *Emly Grennan*. The point to be decided on that finding, is whether those lands did or did not pass under the word rectory in the order of the Lord Lieutenant and the Privy Council. It is submitted that they did pass, and were thereby completely disannexed from the treasurer-ship and annexed to the newly created benefice.

The first question that arises, is whether the Lord Lieutenant and the Privy Council had power, under the statutes recited in their order, to disannex and disappropriate merely a part or portion of the income of the treasurer-ship, and to leave the rest as before. Looking to the intention and to the very expressions of the acts, it is clear that the Lord Lieutenant and Council did not possess such a power. The 124th section of the 3 & 4 W. IV., c. 37, is that on which this question, as to the power of the Lord Lieutenant and Privy Council, depends. In both the preamble and the enacting part of that section "tithes and portions of tithes, and glebes of parishes" are spoken of; and in the preamble it is recited that many of them are annexed to "dignities," a description that is fully answered by the treasurer-ship of this cathedral church. In the enacting part, the Lord Lieutenant and Privy Council are authorized to "disappropriate, disunite, and divest any rectory, vicarage, tithes, or portions of tithes, and glebes, or part or parts thereof, from and out of any dignity, &c., and to unite any such rectory, vicarage, tithes, or portions of tithes, to the vicarage and perpetual or other curacies of such parishes respectively." "Portions of tithes, or part or parts thereof" cannot here mean portions of such tithes as belong to a rectory, but the whole of what belongs to it, whether that may consist of tithes or of portions of

(c) *Wilson v. Loveland*, 7 Irish Law Rep. 231.

tithes : all that is attached to a rectory must be disannexed with it. It will be contended on the other side that the Lord Lieutenant had power to disannex parts of the profits of a rectory, and that these words do not mean all the profits of the rectory ; but no other meaning would be reasonable. Particular persons may, under particular circumstances, possess portions of the tithes of a parish, independently of the rectory, and these words would exactly meet such a contingency, and were introduced into the act for that purpose. Again, it is impossible to say that the act meant to apply merely to what is, in ecclesiastical language—a rectory, it meant the profits of the rectory ; for the whole purpose of the act was, not to divide rectories and curacies, and change their extent and limits, and the duties of the rectors and curates, but to arrange the profits of them in such a manner as to augment the incomes of the poorer livings. It is clear, therefore, considering the intentions of the legislature in passing this act, that the power to disunite and to appropriate anew the profits of a living, was specifically that which was intended to be given to the Lord Lieutenant and Privy Council.

Then comes the question whether they have disannexed the rent charges, but left the glebe lands as before ? This question depends on the construction of the order itself, and must be answered in the negative. They intended that all the profits of the rectory, glebe lands as well as rent charges, should pass. The operative part of the order is that “The parishes or rectories of *St. Patrick's*, and the rectorial tithes thereunto belonging, and the parishes and rectories of *Cahirvalla* and *Emly Grennan*, and the rectorial tithes thereunto belonging respectively, be divested from and out of the treasurership, and transferred to the ecclesiastical commissioners.” It will be contended, on the other side, that nothing will pass here beyond the tithes, or that rent-charge which is now by statute substituted for them. But it is settled law that “by the grant of a rectory, will pass the house, the glebe,

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the tithes, and offerings belonging to it," *Sheppard's Touchstone* (d); and in this order in council the word "rectories" was used in its largest and most unrestricted legal meaning. It is clear therefore, that this part of the income would pass, if there was nothing to control the legal meaning of the words employed. There is nothing here to control that meaning. On the contrary, there is every thing to make it applicable. The order states the revenues to be dealt with, and among them states the further income arising from the demised lands, and the special verdict finds the fact that among the demised lands from which this further income was derived, there were these very glebe lands. There was no intention on the part of the Lord Lieutenant and Privy Council to restrict this grant. If there had been, they would have known how to express such an intention. Every thing existed in this case to bring it within the intention of the legislature which was that of better providing for the maintenance of ministers who had active duties to perform, and whose stipends were insufficient. Here was a parish, with a cure of souls, insufficiently provided for. The words "parishes, rectories, and rectorial tithes," used in the order, do not justify the argument that nothing else but what will come under the most limited meaning of those words was intended to pass. The use of the words rectorial tithes was a mere redundancy of expression, and cannot affect the plain intention of the order, which was to pass the revenues of the rectories in question, by passing the rectories themselves. Here the order states the things on which it is to operate, and operates on all. In *Mabie's* case (e), Lord *Hobart* says, "If I let my rectory, excepting my glebe, the exception is void; for no rectory may be without glebe: he may except parcel of the glebe and goods, but in pleading the lease of a rectory, this shall be

(d) Ch. v., p. 93.

(e) Winch's Rep. 23.

taken for the whole rectory, and not for parcel." That principle is decisive here. The expression is not only large enough to pass the whole, but if any exception is to be established, it must be distinctly expressed to be so. That has not been shewn to be the case here; the general rule will therefore prevail, and the judgment of the court below must be reversed.

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Mr. *Wakefield* and Mr. *E. T. Hurlstone*, for the defendant in error. The order in council does not pass the lands which are the subject of this ejectment. In the first place, the Lord Lieutenant and Privy Council had no power permanently to disannex them from the treasurership. If the statute is carefully examined, it will be seen that the power is to disannex, whenever any of the dignities mentioned in the act shall be void. The Lord Lieutenant and Privy Council are from time to time to exercise their discretion in the matter; and for this reason it is that the bishop, on occasion of each vacancy in the treasurership, gives notice to the ecclesiastical commissioners. The 124th section of the statute itself, shows that the annexation is not necessarily to be permanent, for it expressly provides that whenever the net income of the benefice erected shall exceed 200*l.*, the augmentation, or the portion thereof whereby it exceeds that sum, shall cease and determine. So that it is plain that the Lord Lieutenant and the Privy Council did not possess the power to disannex in perpetuity the revenues of the treasurership.

But further, it is contended that the Lord Lieutenant and Privy Council had power to disannex part of the profits of a rectory, and to leave the rest as before, and that such was their intention in the present case. The words "portions of tithes, and part or parts thereof," in the 124th section, do not bear the restricted and technical meaning sought to be put on them by the other side. They mean portions or parts of the tithes in the ordinary

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sense of that term, and the Lord Lieutenant and Privy Council might, under this provision in the statute, have disannexed a third, or a half, or any part of the tithes, and the order would not, on that account, have been objectionable.

[*The Lord Chancellor.*—We think that there is no doubt as to the power of the Lord Lieutenant and Privy Council to disannex any part or parts of the profits of a rectory. The only question, therefore is, whether that was their intention in making this order?]

It is contended, that that question must be answered in the affirmative. The words of the order transfer only the “parishes and rectories, with the rectorial tithes.” These words will not pass the demised lands. It is not the same as if the word rectory alone had been used, for then it might have been contended, under the authority of the dictum in *Shepherd's Touchstone*, that everything connected with the rectory passed. But here other words are used; specific and not general expressions are employed in the order, and a strict legal meaning must be given to them. If part of the lands demised must necessarily be included in this order, the whole of the lands demised must be included in it, for there is but one general reference to them; but part of them consisted of the treasurer's garden, which it is not attempted to say passed under the order. Then how is the distinction to be made as to what demised lands did or did not pass? It was the intention of the Lord Lieutenant and Privy Council to transfer the rectorial tithes alone to the ecclesiastical commissioners, and to leave the rents arising from the glebe lands to the treasurer. This must have been the intention, since it would have been unjust to leave the duties of the office of treasurer to be performed, and yet to strip that office of almost all its income. No such intention was manifested by the Lord Lieutenant and Privy Council. It could not have been entertained; or if it had, the expression of it was easy, and no ex-

pression to that effect can be found. The question therefore becomes purely a question of the construction to be put upon the words actually used. Now it is plain that those words have more than one meaning; and if they do not necessarily bear the meaning which deprives the present possessor of his existing rights, the law will not, by mere implication, assign that meaning to them. It may be true, as a rule, that the word rectory will pass the glebe; but that rule will not apply to a case where the several means of income are specifically enumerated, and then some alone of them are disposed of. The word rectories is, throughout, united with the word parishes in the operative part of the order, and must be construed as synonymous with that word, and must therefore be taken to mean the districts which are to be taken from the treasurership, and annexed to the perpetual curacy. And there is the greater reason for giving this signification to it, because, if construed in its more technical and comprehensive meaning, the separate and express grant of "the rectorial tithes thereto belonging," would be idle and superfluous; for these words would, upon the construction contended for on the other side, be already included in the word "rectories." The word rectories will be sufficiently satisfied by assigning to it the meaning of the territorial district and spiritual duties of the rectories. Such a construction will get rid of all the contradictions and difficulties that must otherwise beset the interpretation of the order.

The Lord Lieutenant and Privy Council have by their conduct shown that they do not mean to disannex all the revenues. They had the power to suspend the dignity of the treasurership. They have not suspended it. [*The Lord Chancellor*.—There is a power to suspend it as long as the Lord Lieutenant and Privy Council may think fit: was there any order for that purpose?] There was not; and that fact is relied on to show the intention of those who made the order to have been, that the dignity of the

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treasurership should continue; and if so, there could not be any intention to take away all its revenues. Some provision must be made for its maintenance. The words of the order are, that the rectories shall be disannexed, together with the rectorial tithes thereto belonging: none but the rectorial tithes can be disannexed by such an order. After these words, the use of which shows that the word rectories was not employed in its extensive legal sense, the order goes on to speak of the further income belonging to the treasurership. This shows that the Lord Lieutenant and Privy Council had in view something separate and distinct from what had been before described in the order; something that was not included in the phrase rectorial tithes. Now it is clear that this new subject matter was not distinctly and in terms disannexed from the treasurership. Was it in any manner expressly dealt with? Certainly not. It is described to exist, and then nothing further is said about it. It is submitted that this is a very strong circumstance to show that the income thus referred to was meant to be allowed to remain in its then state, and to be applied in the same way as before. It is impossible, after this mode of treating this part of the income of the treasurership, to justify the transfer of it from the treasurer by the mere force of implication. If the glebe had been meant to pass, the word glebe would have been inserted in the Order. The glebe is wholly distinct in its nature and qualities from rectorial tithes: both had been alluded to; one description of income alone was declared to be disannexed, and the omission of the other from the operative part of the order, shows very plainly that there was a positive intention to exclude it from the operation of that order. Such has been the construction of this order in the Courts below, and such, it is confidently submitted, was the right construction of it.

The Lord Chancellor.—My Lords, this case I have looked at with very considerable anxiety, being unable to concur in the opinion of the great majority of the Judges of the Court of Exchequer in *Ireland* who have had it under their consideration. It certainly is a case of very considerable difficulty; and the document on which the House is called upon to put a construction is so worded as to be very obscure, and to raise difficulties which are not very easy to surmount. But one thing is perfectly plain, namely, that in terms the order of the Lord Lieutenant in Council transfers the rectory to the commissioners. About that there is no dispute. The terms are, “and we do hereby further order and direct, in pursuance of the hereinbefore last recited act of the third and fourth years of her present Majesty’s reign, that the said parishes or rectories of *Cahirvalla* and *Emly Grennan*, and the rectorial tithes thereunto belonging respectively, be, and the same are hereby disappropriated, disunited, and divested from and out of the said treasurership of *St. Mary, Limerick*, and transferred to the ecclesiastical commissioners of *Ireland*.”

We, therefore, have this order of the Lord Lieutenant in Council under the authority of the Act of Parliament, which enables that body so to deal with this ecclesiastical property, disannexing the rectory and the rectorial tithes thereunto belonging from the treasurership of *St. Mary’s, Limerick*, and transferring them, as they are authorized to do, to the ecclesiastical commissioners of *Ireland*.

Then it appears that the rectory in question consisted not only of the tithe rent-charge which had been created under the act authorizing it, but that it, as might be expected, consisted also of certain other descriptions of property, viz., of the glebe land. The glebe land being at that time under lease, nevertheless constituted of course part of the rectory; and it is said that upon the construction of this document the intention of the Lord

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Lieutenant in Council is plain, and that the effect of the document is only to transfer the tithes, or the rent-charge which stands in the place of the tithes to the ecclesiastical commissioners, and to leave the glebe as part of the property of the treasurership.

As we find the term "rectory" used, which, beyond all doubt, would, unless it be shewn that it was not used in its ordinary sense, carry the glebe lands as part and parcel of the rectory, those who contend against that larger construction must shew upon the face of the instrument itself, that that was not the intention of those who were the authors of this instrument, but that their intention was to divide the rectory and to transfer only the rent-charge to the commissioners, and to leave the glebe as part of the property of the treasury. That must not be left as matter of mere speculation: it must not be a guess at what the intention may have been; but the intention must be found upon the face of the instrument itself, and if that intention be found, then I quite agree that it is not material what the words used are. Every word being only for the purpose of conveying some meaning, if the meaning be clear and distinct, and it is evident that those who were the authors of the instrument used it in a particular sense, or with a view to a particular description, then no doubt that intention appearing on the face of the instrument will prevail, though terms not perfectly appropriate have been used to carry that intention into effect. But that must be clear, because the legal import of the word being clear, it can only be superseded by something which convinces the mind that it was not used in its ordinary legal sense and import.

Upon looking over those parts of this document, in which that question arises, I confess that although I see evidently a great deal of ambiguity, and although there is great difficulty in explaining how some of the expressions found their way into the instrument, I am very far

indeed from being satisfied that the intention of the commissioners was to use the term "rectory" in that limited sense, namely, rectory with the exception of the glebe lands, for that is the contest on the part of those who claim for the treasurership these glebe lands.

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There are various modes in which this document may be read. The terms are [his Lordship here read the document especially referring to that part which described the revenues of the rectory]. Then comes the clause which I before read as applicable to the particular parish in question. If the intention, which is supposed, really did exist with respect to the parish in question, the same terms are used with respect to the other parish, where, it appears, that there was a perpetual curacy, and in that case, under the provisions of the act, that perpetual curacy ceases to be a perpetual curacy, and becomes a rectory, the rectory being transferred to some other body with whom the Lord Lieutenant and Council thought it ought not to remain a curacy. The curacy becomes a rectory, and we have this singular intention therefore imputed to the Lord Lieutenant and Council, that whereas the rectory was intended to be so dealt with by them as to be thrown into and added to the perpetual curacy, so as to constitute a benefice which might exist for all future time for the benefit of the parish, they nevertheless intended that this benefice should be deprived of the glebe, the revenue of which constituted a part of the 80*l.*, and that the glebe should remain in the hands of the treasurer. It is perfectly plain that if such was the intention of the Lord Lieutenant and Council, it was within their power to effect that intention; but it would be a singular arrangement for them to make, to deprive a benefice, now become a rectory, of the possession of the glebe that properly belongs to it. With regard to the particular parish in question, they had not proposed at that time to dispose of the rectory; the act, therefore, was only operative for the purpose of taking it

case one cannot well understand how it is
to deprive that rectory of its glebe.

I have read all the words of this instrument
the question arises, and I think, reading it
it would be very difficult to say that the
apparent intention declared by the Lord
council as to operate on the word "rectory"
prive it of its ordinary meaning, and that the
intention was to leave the glebe producing
80% a year in the hands of the treasurer.

There are various ways in which this may be
which would lead to one conclusion or another
that the Lord Lieutenant and the Commissioners
thors of this instrument, must have known
constitute part of the rectory (in which case
sently consider what the consequence would be
they were in ignorance of the title to the
this rent, and I will consider what the effect
position would be upon the construction of
instrument.

This instrument may be read in this way
stating of what the treasurership consists
treasurership consists of the Rectory of
and two other rectories, which are named
therefore of those three rectories. Then
meration, not of the revenues of the treasurership.

amount derived out of each of the three rectories. Then comes this passage, "There is a fourth income belonging to the treasurership, arising from the demised lands, amounting to the yearly sum of 80*l*. Now if those demised lands had consisted altogether of glebe, in one or other of those three parishes, I think the natural construction would be, although the term is varied, that, having before stated that the property of the treasurership consisted of the three rectories, the construction would be that it went on to dispose of all the property thus enumerated. Having disposed of the tithe rent-charge, which, every body knows, does not necessarily or usually constitute the whole of the property belonging to the rectory, but which had been enumerated as part of the property belonging to the rectory, this further passage would be an enumeration of some other property of the rectories, which rectories are stated to constitute the income of the treasurership. It appears there is a small portion of this which was not attached or belonging to any one of the rectories, but is called the Treasurer's Garden, the title of which does not appear; but there does not seem to be any reason to suppose that it was part of the glebe land of any one of the parishes, the possibility is, it might have been so—I assume it was not so in fact. That undoubtedly would shew there was some error, because if it be construed in the way I am now suggesting, namely, that this 80*l*. a year arose from other portions of property belonging to the rectory, it would be inaccurate in having included in that sum that small portion called the Treasurer's Garden. Now if that were so, and if that were considered as a mistake, it would only be attributing too large a sum to the glebe land belonging to the rectory; then you would infer the authors of the instrument did know, with that exception, the history of this property. What would be the inference from that knowledge, so inferred from what we find on the face of the instrument? It would be this, the property of the

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treasurership consists of the rent three rectories, and consists of the rectories producing a certain annual operative part of the instrument the treasurership in one case, a curacy, and in the other leave commissioners. In that view of be no ambiguity, there would be amount of the glebe lands at 12l. short of 80l. But there was on the face of the instrument, on that that they intended to leave the of the treasurership, because rectories consist of, it would in they were large enough to carry of the treasurership the rectory in question, then, which would arise upon the instrument at all, would be that it does not and does not enumerate anything that amplification will not operate something not expressed, if the face of the instrument sufficient not enumerated.

That would be the result on that were the authors of this instrument property. There is another supposition probable of the two, namely, that the state of the property, and other they conceived that this was the treasurership, and that it was the rectory, and did not form part of the property. The effect of that supposition would be the effect of that supposition or the other you must suppose the rectory would be this, namely, that they conveyed the rectory; but that they intended of that which they conveyed the rectory, and, of course, in that

intention of separating anything belonging to the rectory from the rectory itself, because being ignorant of what formed part of the rectory, you cannot presume an intention of separating from the rectory that which, in this view of the case, they did not suppose to belong to it. That never could be admitted as a ground for this construction of the instrument, because, upon that supposition, they were ignorant of the extent of what they were doing; but they have used terms ample and large enough to convey the whole.

It is very difficult to impute this intention to them, because, first of all, anybody considering this maturely, as it is necessary now to consider it, must be struck with the circumstance of the three rectories having none of them any glebe, and not having anything but the tithe-rent charge; but that is the supposition which we must make, if we imagine that in the words which are used in describing the '80l., they were considering the 80l. as arising from other property.

I am assuming, for the present purpose, that there is sufficient upon the face of the instrument to lead to the fair inference that they imagined that to be the case. I apprehend that would be equally inoperative for the purpose of affecting the meaning of the terms which they have used. First of all, do the parties who contend for this construction, prove it? Can anybody be satisfied that that was the case? You may suppose and speculate upon, and think it more or less probable; but it is impossible to say that, upon the face of the instrument, there is any proof that they acted under that state of ignorance. On the face of this instrument you must find the intention to use the word "rectory" in a sense different from that which is the ordinary and legal sense; and not only you do not find any such intention manifest, but when you look at all parts of this instrument for the purpose of discovering what was in the minds of those who were the authors of it, you find something of an exactly opposite kind. I find one supposi-

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tion in one part, and another in another, and to any certainty, or enabling us to determine whether it will be safe to depart from the ordinary meaning of the word used. I agree, therefore, with *Crompton*, in the opinion which he is bound to construe this expression : "not sufficient," and that there is not sufficient evidence to draw a conclusion that the authors of it intended a sense than that which was its legal meaning.

I am therefore under the necessity of referring to your Lordships to reverse the judgment so pronounced, and to give judgment in favour of the plaintiff in error.

Lord Campbell.—My Lords, I noble and learned friend, the Lord which he has taken of this case just construction of the Act of Parliament and council had the power and transfer the glebe land, because words of the statute are clear and doubt that they had that power; preamble cannot controul the words the statute.

This, therefore, brings it to a
struction of the Order. Now the
which are in themselves universa
dantly sufficient to carry the g
tithes and all the temporalities, th
those who limit the operation of t
thing else upon the face of the
operation. My Lords, I have a
of the Order, and I take the sam
and learned friend on the woolsa
a mere matter of conjecture to
Lieutenant and council did not
which they have employed their u
and if I were really to form a co

likely come to the conclusion that they really meant that the whole of the rectory, and every thing belonging to it, should be included.

I cannot get out of the dilemma proposed by the 5th reason of the plaintiff in error—"Because the Lord Lieutenant and Privy Council in *Ireland* at the time of making the Order, bearing date the 25th day of *February*, 1841, either did know or did not know that the rent was derived out of the glebe lands of *Emly Grennan*. If they did know of this fact, they must be taken also to have known that in disappropriating the rectory, the glebe lands belonging to the rectory passed with it ; and if they did not know this fact, but supposed the rent to arise out of demised lands, forming no part of the rectory, but other and distant property belonging to the treasurership, then it is clear that they could not have intended to except that out of the rectory which they did not know to be part of it, and that when they used the word 'rectory,' they did so in its full and legal acceptation, intending the rectory with all its incidents to pass." I have no doubt the first branch of the dilemma is the true one. The Privy Council of *Ireland* consists of the Lord Chancellor of *Ireland* for the time being, and the Judges, who very carefully and anxiously consider such cases, and I have no doubt that at that time there was a very strict investigation into all that belonged to this rectory ; and that if there had been any intention that the glebe land should have been excepted, there would have been an express proviso of exception introduced into the Order. I come to the conclusion, therefore, notwithstanding that in some parts the Order is drawn rather in a slovenly form, that those who drew this Order were perfectly well aware that the rectory consisted not only of the rent-charge but the glebe lands, and that they intended that the whole should be transferred when they used the word "rectory," which they did in its legal sense, and of which they knew the full meaning.

Judgment reversed.

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1846.
July 16, 20. THOMAS ROGERS - - *Plaintiff*
THOMAS SPENCE - - *Defendant*

*Assignees of
Bankrupt.
Trespass.
Pleading.*

A declaration in trespass stated a breaking and entering the doors, hinges, and locks; spoiling the goods; and exposing the plaintiff's goods to sale; by means of which, &c., the plaintiff was disturbed in the possession of his house, but prevented from carrying on his business, and deprived of the enjoyment of his goods. The defendant pleaded that, before the action, the plaintiff became a bankrupt. Held, on general issue (affirming the judgment of the Court below), that some causes of action included in the declaration did not pass to the assignees, the plea which embraced the whole and was not addressed to any particular portion of the declaration, was insufficient, and bad.

and forced and broke open, broke to pieces, and damaged divers, to wit, ten doors of *Spence*, of and belonging to the said dwelling-house with the appurtenances, and broke to pieces, damaged, and spoiled divers, to wit, fifty locks, &c., of great value, &c., and trod down and spoiled the grass and herbage of *Spence*, of great value, &c., and tore up and spoiled the fruit trees and shrubs of *Spence*, of great value, &c., and seized the goods of *Spence*, to wit, of great value, &c., and wrongfully exposed the same for sale, in and upon the dwelling-house of *Spence*, without the permission, licence, or authority of *Spence*, whereby, and by means of which several premises, *Spence* was not only disturbed, &c., in the possession of his house, but prevented from carrying on his lawful affairs and business, and deprived of the use and enjoyment of his goods and chattels.

Rogers, by a plea dated 8th *December*, 1842, pleaded that *Spence* ought not further to maintain his action, because, heretofore, and after the 11th *November*, 1842, *Spence* was a trader, and was indebted to *Rogers*, and absented himself from his dwelling-house, and that a fiat in bankruptcy issued against him upon the petition of *Rogers*, and that on the 3d *December* he was declared a bankrupt, and that one *William Pennell* was appointed official assignee of his estate, and accepted and took upon himself the burden thereof; by virtue of which said appointment and acceptance as aforesaid, and by force of the statutes in such case made and provided (a), the causes of action in the declaration mentioned, became and were, and each and every of them, became and was ab-

(a) 6 Geo. 4, c. 16, s. 63, by which it is enacted, that the commissioners shall assign to the assignees, for the benefit of the creditors of the bankrupt, all the present and future personal estate of such bankrupt, wheresoever the same may be found or known.

Sect. 64. The commissioners shall convey to the assignees,

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solutely vested in and transferred to *Pennell*, as such official assignee, under the said fiat, &c. Verification.

Spence put in a general demurrer to this plea, and the paper book stated the ground of the demurrer to be, that the declaration upon the face of it disclosed a variety of causes of action, which did not, according to law, pass to or vest in his assignees.—*Rogers* joined in demurrer.

Judgment was given by the Court of Exchequer against the plea (a), and the case was then carried to the Exchequer Chamber, where that judgment was affirmed (b).

Mr. *George Atkinson* for the plaintiff in error.

The Courts below decided this case on the authority of *Clark v. Calvert* (c). The true grounds of that decision were—1st, That the assignees had not interposed to divest the bankrupt of his leasehold interest (for want of which averment the plea was substantially defective; *Copeland v. Stephens* (d), *Williams v. Bosanquet* (e)); and, 2ndly, That no one can maintain trespass *quare clausum fregit*, but he who is in actual possession of the *locus in quo* when the injury is done. This latter ground alone affects the present case. The case of *Clark v. Calvert* is, at best,

for the benefit of the creditors as aforesaid, all lands, tenements, and hereditaments, except copyholds, &c., to which any bankrupt is entitled, in any of such lands, &c.

1 & 2 W. 4, c. 56. When any person hath been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against such bankrupt, shall become actually vested in and transferred to the assignees or assignee for the time being, by virtue of their appointment.

By sect. 26, a similar provision is made as to real estate.

(a) 11 Mee. & W. 191. * (d) 1 B. & A. 605.

(b) 13 *Id.* 571. (e) 3 Moore, 500.

(c) 3 B. Moore, 96; 8 Taunt. 742, S. C.

one of doubtful authority, for the contemporaneous reporters differ materially in their statements of the facts, and, judging by the discrepancy in the marginal notes, in their views as to what was the legal effect of the judgment. But as the judgment seems to have been delivered after a time taken to consider, it must stand or fall upon its own merits alone. Upon an accurate examination it will be found to be erroneous. Lord Chief Justice *Dallas* there says, "This is an action of trespass for an injury done to the soil, and which no one can maintain but he who is in the *actual* possession of it." If by the word "actual" here used, it is meant that the bankrupt alone can maintain the action, because he was in possession when the trespass was committed, and that his assignees cannot maintain it because they were not in possession at the time, the proposition is erroneous; for it is a familiar rule of evidence, that such an action may be supported by other and different possession than actual—namely, by constructive possession; *Starkie* on Evidence (*f*), and the cases there collected; the new rules (*g*). If, therefore, the word, actual, was in that judgment used in exclusion of constructive possession, the authority of *Clark v. Calvert* cannot be sustained. And again, if evidence of constructive possession will support such an action, all idea of personal damage falls to the ground. On this demurrer it is sufficient for the plaintiff in error to show that such an action may be maintained on a constructive and statutory possession, such as exists here. A difficulty of pleading seems to have suggested itself to the Court in *Clark v. Calvert*. But on the 4 Edw. III., c. 7, and on the 3 & 4 Wm. IV., c. 42, the declaration, in the case of executors, who in principle may be assimilated to assignees, must be framed on the possession of the deceased person. But if the word,

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(*f*) Tit. Trespass.

(*g*) Reg. Genl. Hil. T., 4 W.
 IV., "Trespass," s. 2.

the pleadings are framed upon his position, precedent is to be found upon the 3 & 4 Wm. IV. it cannot be denied but that the declaration is framed. Upon what principle is this? Upon the principle that the executors are made statutory plaintiffs, and so, under the 6 Geo. IV., c. 16, s. 63, made statutory plaintiffs.

[Lord Campbell.—You are assuming that the action passed to the assignees.]—The action is founded upon that assumption; but the case of *Clark v. Calvert*, and the decisions of the Courts below, seemed to demand these observations.

What is the cause of action here? *breaking and entering*—the rest is mere variation. The whole fallacy of the argument below consists in the supposition that the cause is involved in this issue. If there was an issue on the plea more extensively, it would fail, and would be bad upon demurrer. The plaintiff has, perhaps, the power to make what is here a variation of the principal trespass, a distinct count in a separate count, and to that the defence might be pleaded differently. As it now stands, the plaintiff could have adopted no other form of plea.

Gudge (m), distinctly establish the proposition that the breaking and entering is the gist of the action, and all the rest of the declaration mere matter of aggravation, which could not be pleaded to, or involved in the issue.

These cases likewise shew, beyond all controversy, that if the plaintiff below meant to rely upon any thing, *primâ facie*, mere matter of aggravation, as a distinct ground of action, it ought to be replied, or new assigned.

A chose in action of this sort does pass to the assignees. There is no case directly in point, but there are numerous authorities affirming the principle. It is clear, that cases arising out of contracts form a class of that kind. But there is another class of cases arising out of torts. *Smith v. Coffin* (n) shews that a right to bring a real action exists in the assignees. *Mitchell v. Hughes*, *Hancock v. Caffyn*, *Wright v. Fairfield*, *Drake v. Beckham*, also shewed that a chose in action in tort, as well as in contract, is part of the *personal estate* of a bankrupt under the 6 Geo. 4, c. 16, s. 63, and as such, passes to his assignees. It is scarcely possible to see why, on principle, an action of *trespass quare clausum fregit* should not range under the former category; it is a chose in action—it is personal estate—it is an injury to the land, which passes to the assignees for the benefit of creditors. [Lord Campbell.—It is an injury to the *possession*, and not to the *land*.] No: it is an injury to the land, of which possession is evidence of title: for an injury to possession (if there could be such a thing), the form of remedy would be *case*, and not *trespass*. The pleas of right of way, leave and license, Statute of Limitations, and the like, shew that it is an injury to something real and substantial, and not to a thing incorporeal.

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(l) 8 Barn. & Cres. 257. Bing. N. C. 72; 4 Moore &

(m) 7 Scott N. R. 1025; Scott 588.

see also *Bush v. Parker*, 1 (n) 2 H. Bl. 451.

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The spirit in which the bankrupt laws have been construed, shews that this is an action which will pass to the assignees. What would be the consequence if it would not pass? Suppose an injury of this sort, and the value of the property depreciated one half—the assignees would thereby receive the property of the bankrupt much deteriorated in value. Ought they not, under such circumstances, to be entitled to maintain an action.

In *Hancock v. Caffyn* (o) Lord Chief Justice Tindal said (p), “The next objection is that the right of action, in the present instance, if any exists, is not of a nature to pass to the assignees. Undoubtedly there is a large class of actions in which the assignees of a bankrupt cannot put the law in force. Rights of action for injuries to the person of a bankrupt do not form the subject-matter of the assignment contemplated: neither does a right of action for slander, or for a libel, pass by the assignment. But it seems to me that we should be giving a very inadequate interpretation to the words of the Statute 6 Geo. 4, c. 16, if we were to hold that the assignees cannot maintain an action for a wrongful deterioration in value of property coming to them by assignment;” and he afterwards added: “When the assignment is to be of all the personal estate of the bankrupt, why are the assignees to be precluded from the right to recover compensation for an act whereby the property of a bankrupt has come to their hands in a less valuable condition than it otherwise would have done. The case of executors is analogous.” If the bankrupt here had died, his executors would have been entitled to sue for the injury which his real estate had suffered. [Lord Campbell.—Assuming that the breaking is the gist of the action, how does it appear that the property was injured? The bankrupt can maintain the action, because his possession was disturbed.] The right of

(o) 1 Moore & Scott, 521. (p) *Id.* 533.

action vests, because the land has been injured by the trespass.

Then it is said on the other side, that the plea is bad, because it does not state that the real estate, on which the injury was committed, did pass to the assignees of the bankrupt. But if the construction put by the defendant below on *Beckham v. Drake* and *Smith v. Coffin* is correct, it is immaterial whether the real estate did pass or not, or whether the bankrupt parted with it or not. *Beckham v. Drake* proceeded on the ground that the contract remained with the bankrupt, and that the chose in action, or the right to recover damages for the breach of that contract, did pass to the assignees. So, in *Smith v. Coffin*, it was said in argument, that a right to a real action could not, in the language of the 13 Eliz., c. 7, be "departed with" by the bankrupt; but the Court held that it could, and that it was of a descendible quality. Suppose the bankrupt here had sold the estate to a third person for a valuable consideration, if that case is still law, as it is a principle of law that a chose in action is not assignable, the right to maintain this action *must* have remained in the bankrupt till the appointment of his assignees. In *Comyn's Digest* (q), it is said, "So, if a man takes the goods of B., who afterwards grants them to another, yet B., after the grant, may have an action for the taking." In terms, that dictum applies only to personal property, but it is equally applicable to real property, for a chose in action once vested can never be divested.

In the Court below Mr. Baron *Alderson* asked whether there were any damages here which the bankrupt could recover, and the assignees could not. That question supposed something of an entirely personal nature in the declaration, which would not give the right to the assignees to ask for damages at all. But the test thus proposed is fallacious, since, according to the form of the declaration, the

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breaking and entering constituted and the other matters were merely [Lord *Campbell*.—Could the action be maintained on the ground of mere personal suffering of the plaintiff's feelings?] They could, and for the cause of action, as it appears on the face of the pleadings, is the simple breaking and entering, and the aggravation arises out of and constitutes that trespass, a trespass to the person. It was a personal wounding of the plaintiff in the premises at the time he was there. To prove it, to shew the character of

[*The Lord Chancellor*.—When the action is brought to and may be maintained by the plaintiff, the bankrupt is gone. The cases, where a bankrupt bringing an action for the damages as in trust for them. In the present time, assignees sue for the possession of the bankrupt's estate, that actual possession was never in the plaintiff, the right of action. The cause of action is the operation of law, and it is sufficient that it did pass. It was not, therefore, that this particular estate passed, but the right of action passed. If the title to the real estate, then the action is a section of the Bankrupt Act, and it is to be reversed.

Mr. *Peacock* for the defendant shewed that its present form can only be maintained on actual or constructive possession. It is neither actual nor constructive possession at the time of the trespass committed. It is absolutely necessary, in order to maintain an action of this kind.

recover damages for an injury done to the property by which its value has been lessened, but to recover damages for a disturbance of the bankrupt's possession and enjoyment of the premises. This single consideration disposes of the whole objection. The judgment of the Court below must be affirmed. The objection to it proceeds on a principle which cannot be applied to the present case. *Smith v. Coffin* (r) is not decisive of it. The doctrine there stated by Lord Chief Justice *Eyre*, that "the express and plain spirit of the bankrupt laws is, that every beneficial interest which the bankrupt has shall be disposed of for the benefit of his creditors," is not disputed. That doctrine was re-asserted and explained by Mr. Justice *Buller* (s), who said, "the object of the bankrupt laws is, that everything belonging to the bankrupt, that can be turned to profit, shall pass by the assignment for the benefit of the creditors." The learned Judge then goes on to refer to the different matters which, in his opinion, may be turned to the profit of the bankrupt, and shows, throughout his observations, that he meant only to refer to those rights which are called rights of property. The authority, therefore, of that case, and even of the expressions employed in the judgment by Lord Chief Justice *Eyre* and Mr. Justice *Buller*, may be admitted, and yet neither the case itself, nor even the expressions used by the Judges, will afford the rule by which this writ of error can be decided.

The plea is defective in several respects. This is merely an action for trespass on the land, and it does not appear by the plea that the land ever passed to the assignees. But there are other defects in the plea. It does not appear whether the property is leasehold or freehold; if the former, what was the interest which *Spence* had in it, and whether that interest has expired

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(r) 2 Hen. Bl. 444-461. (s) *Id.* 463.

case the assignees would clearly be entitled to the interest that passes to them can only be as that to which the bankrupt was himself entitled. The nature of that interest ought to be the same as the title of the assignees is set up as a bar to the right of action. The bankrupt might have retained the property before his bankruptcy, in which case it is clear that nothing would pass to the assignees. An objection taken by Mr. Baron Parkes in the Court of Exchequer; and held that this case was precisely the same as *Calvert*. It is therefore submitted, that *Smith v. Coffin*, and *Michell v. Hughes* are not the present; for the right of the bankrupt to bring this action, which he brings this action, is not such as would pass under the 63rd & 64th sections of the Act, c. 16.

It must be admitted that every chose in action passes to the assignees; one instance of which is an action against a surgeon for negligence in the performance of his duties of his profession. Yet the bankrupt cannot be seriously affected by his continued illness and being disabled. Nor will a right of action on a contract pass to assignees, *Beckham v. D'Almeida*.—It must be a contract in respect of which the bankrupt is to be considered as a party.

his testator for the breach of a covenant not to fell, stub up, lop, or top timber trees excepted out of the demise, such breach having been committed in the lifetime of the testator, but the case was put entirely on the ground of the interest in property. It was there said by Lord *Abinger* (w), "the old authorities are uniform, that the personal representative may sue, not only for all debts due to the deceased, by specialty or otherwise, but for all covenants, and indeed all contracts, with the testator, broken in his lifetime: and the reason appears to be that these are choses in action, and are parcel of the personal estate, in respect of which the executor or administrator represents the person of the testator, and is in law the testator's assignee. And this right does not depend on the equity of the statute 4 Ed. III., c. 7, but is a common law right, as much as the right to sue on a bond or specialty for a sum certain due in the testator's lifetime. The maxim that *actio personalis moritur cum personâ* is not applied in the old authorities to cases of actions on contracts, but to those in tort, which are founded on malfeasance or misfeasance to the person or personal property of another, which latter are annexed to the person, and die with the person, except where the remedy is given to the personal representative by the statute law." In like manner, in *Beckham v. Drake*, it was said that every beneficial interest of a bankrupt might pass to his assignees, but that rights of action for assault, battery, slander, seduction of child or servant, contracts to cure, and contracts to marry, would not pass to assignees or executors. Yet for every one of these torts the bankrupt would be entitled to recover damages. *Brewer v. Dew* (x) is directly in point here. It was there held that an action of trespass for seizing and taking the plaintiff's goods, under a false and unfounded claim of a debt, *per quod* the

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(w) 2 Crom. Mee. & R. 596. (x) 11 Mee. & W. 625.

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plaintiff was annoyed and prejudiced in his business, and believed by his customers to be insolvent, and certain lodgers left his house, did not pass to the plaintiff's assignees on his bankruptcy. And in *Chamberlain v. Williamson* (y) it was held that the executor of a woman could not sue for damages for breach of a promise to marry, the declaration not stating any ground of injury to the personal estate. Nor can the personal representative sue a medical practitioner for not using proper skill and attention to a patient, for this is a cause of injury to the person only. [Lord Campbell.—The great practical difficulty is this. Suppose that by one and the same act some substantial injury is done to the estate, and this is seriously aggravated by a hurt inflicted on the person of a man who afterwards becomes bankrupt, how would you remedy that?] There might be an action for the injury to the estate, and the other matter might be given in evidence in aggravation of damages, or there might be one action for the damage to the person, and another for the damage to the estate. Suppose a carriage was taken in execution when a man was going in it to a dinner party that would be a great annoyance to him; but the right of action for that annoyance would not pass to his assignees and if the assignees brought an action for the taking of the carriage, they could not get damages for the personal annoyance to the person who was riding in it when it was seized. [Lord Cottenham (Lord Chancellor).—Suppose the ship belonging to the bankrupt to be run down, while he is on board, and he is thrown into the water, and he afterwards becomes bankrupt, who must bring the action?] The right to do so would vest in him. [Lord Campbell.—But suppose the ship went to the bottom, but he escaped?] Still the bankrupt might maintain the action in respect of the personal trespass. [The Lord Chancellor.—That might

(y) 2 M. & S. 408.

involve a strange consequence ; it might put the whole of his property into his possession again]. In such circumstances the assignees would not be excluded from likewise bringing an action for the injury to the property ; but if they did not, he might. There are cases in which actions for trespass to goods have been brought, where the jury did not give damages for the goods themselves, and actions have afterwards been brought to recover the value of them.

But, at all events, in order to set up the right of the assignees, it must be shown that the property itself was deteriorated. That is not shown here ; and the plea only answers the injury alleged to have been sustained by the bankrupt and his family. [*The Lord Chancellor*.—The only ground in such a case, where the assignees would have a right to interfere, would be either that the property did not come to them at all, or came in a deteriorated state.] Nothing of that kind is alleged here.

The 3 & 4 W. IV., c. 42, is relied on by the other side. But the words there employed do not justify the argument, which first assumes that those words would vest in executors a cause of action for a mere breaking and entering occurring in the time of their testator, and then, on that assumption, infers that an action like the present would pass to the assignees. This could only be by force of the statute, and not at common law. Now, the 6 Geo. IV. does not give this action, and that statute must be construed by the law as it stood at that time. It is clear that its construction is not in any manner affected by the 3 & 4 W. IV. What was the law before the 6 Geo. IV. ? In *Broke's Abridgment* (z) it is distinctly stated, that a right of action, for a mere breaking and entering, does not pass to the executor. There are many causes of action on contracts which do not pass to the executor.

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(z) Exor. Pl. 120.

Deane v. Atcock (d), the defendant if the plaintiff had become bankrupt, could not have prevented the plaintiff from bringing an action? [*The Lord Chancellor*.—In that case there are two distinct causes of action, here there is only one. The plaintiff here does not seek to recover the goods. Now, *Lacon v. Barnard* (c) shows that an action may be maintained for goods after a verdict for taking them. This action for trespass may be maintained by the plaintiff, without any question, whether any other can be maintained out of the same transaction, by his assignee. There is no doubt that damages to the amount of two hundred and thirty sheep, were so small that they must be considered as given only for driving, in the first instance, and that the defendant took them again, and then lost them, and that the defendant took and converted them. There is no doubt that the cause of action arose from one and the same transaction. [*Lord Campbell*.—But it would be difficult to say that an injury was alleged to the personal estate if it was alleged that there was a breaking of the hinges and a rooting up of the trees and shrubs.] Should the plaintiff not state that it was the estate so injured that was assigned to the assignees. [*Lord Campbell*.—But the injury to the bankrupt is alleged to have been

mine, with a right to take minerals, and long before the bankruptcy a stranger entered and carried away the minerals from the pit's mouth, could not the assignees bring an action for that, though the land itself never came to and vested in them? If the bankrupt had received the value of these minerals, he would have been richer, and the carrying them away was an injury to his personal estate. This shows that you cannot look merely to the circumstance of the land coming or not coming to the assignees.] But the plea does not show that the injury to the estate was the cause of action, or that it was the estate so injured which passed to the assignees. The action was brought in respect of a wrong done to the possession. The bankrupt might have maintained such an action, if he had only been let into possession for a month. The declaration does not show that the bankrupt was forced to expend any part of his estate to repair any injury to the premises. There is nothing in it which proves the action to have been brought for an injury to the personal estate; and if there had been, then the defendant ought to have shown by the plea that it was that matter which passed to the assignees, and in respect of which the plea set up the right of the assignees as against the bankrupt.

This case exactly resembles that of *Clark v. Calvert*, the authority of which is not disputed, and which must govern its decision. The right of action is not one which within the words of the 63d section of 6 Geo. 4, passes to the assignees: it does not necessarily and exclusively relate to property which might become theirs under the bankrupt laws; it is an action for a personal wrong which can be maintained only by the bankrupt, or, at all events, no other character is given to it by the plea. The judgment of the Court of Exchequer Chamber is, therefore, correct, and must be affirmed.

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here is the injury to the land, of which the mere evidence of title. [Lord Cairns versioner has the title, but not the posse not maintain trespass.] Lord Coke (actions personal dying with the person that time all actions wherein damages covered for the plaintiff. That was the law III. Soon after that statute was passed, whether an action for slanderous words provisions. It was decided that it did distinction was clearly drawn between injury person and personal property, and the land. In *Russell's Case* (d) it was decided would lie at the suit of the executors for to the personal estate. [Lord Campbell declaration be good if it merely said, that on a certain day broke and entered this claim. This is an action relating to personal estate before falls within the 63d section of the *Wright v. Fairfield* (e), and *Beckham* establish this. Any injury to the person a right of action, which must pass to the Lord Chancellor.—Suppose this had been property which never could come to the instance, property occupied by the bankrupt and the trespass committed during his

to which will pass to the assignees ; and here the case is, in fact, free from the difficulties raised in argument, on the supposition of injury to the person as well as to the property of the bankrupt, for here his person was not injured at all.

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The Lord Chancellor.—It appears to me, that the judgment of the Court below is right, and right upon a ground which makes it unnecessary to go into a great deal of the matter which has been discussed, raising some questions of very considerable difficulty, to which it is scarcely possible to give a satisfactory answer. For here the declaration states the fact of the breaking and entering on the 20th of *August*, 1842, and the injury to property, breaking locks and taking goods, which were afterwards sold, and then states the special inconvenience and injury to the plaintiff, which he sustained by means of this breaking and entering, and so dealing with his property.

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The defendant pleads the bankruptcy, and all the circumstances connected with the bankruptcy, and the appointment of the official assignee, and then he states this : “ Which said appointment and the trusts thereof the said William Pennell ” (that is, the official assignee) “ then accepted, and took upon himself the burthen of the execution thereof. By virtue of which said appointment and acceptance as aforesaid, and by force of the statutes in such case made and provided, the causes of action in the declaration mentioned, and each and every of them, became and were, and each and every of them became and was absolutely vested in and transferred to the said William Pennell, as such official assignee.”

It seems, in the opinion of one of the learned Judges of the Court below, to have been considered that that was an averment of a fact, and that, therefore, unless the cause of action was one which could not pass to the

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assignees in point of law, that it must be considered to have passed, and did in fact pass. I confess that I cannot so understand it. It seems to me, that that is merely a conclusion of law, which the pleader submits to the consideration of the Court, and that it is not at all an averment of fact. On the contrary, it is the averment of a construction of the statute, and refers to the statute in support of that which it avers.

As I do not consider that averment to amount to any averment of fact, but merely to be a conclusion of law, I look to the declaration to see whether that alleges a cause of action which from its nature must absolutely and necessarily pass to the assignees, and I there find a mere statement of the breaking and entering of the house and the conduct which is alleged in that declaration.

Now it certainly does not follow that that cause of action must necessarily pass to the assignees. It may be, that there are circumstances connected with that transaction which would give a right of action that would pass to the assignees and there may be causes of action that would certainly pass to them. If therefore the plea merely raises, as it seems to me it does, a defence which may or may not apply to the cause of action, it does not cover the complaint, and does not therefore necessarily meet the case, and consequently is no answer to the action. It is impossible, after the argument which we have heard at the Bar, to say that there may not be a cause of action arising previous to the bankruptcy, which may be a good cause of complaint by the bankrupt himself, notwithstanding his bankruptcy, but of which the assignees could not take advantage. If that be the case (and it is possible that it might be the case), it is quite clear that the plea does not cover any such cause of action, and therefore that the plea is no answer to the action, and is, consequently, bad.

Lord Campbell.—My Lords, I am likewise of opinion

that this judgment ought to be affirmed. The plea is pleaded to the whole declaration; and it is incumbent on the defendant below to shew that all the causes of action that are set out in the declaration passed to the assignees, and that none of them can be maintained by the bankrupt; for if any of them can be maintained by the bankrupt notwithstanding his bankruptcy, the plea is bad.

Now, if your Lordships look to the declaration, and see the causes of action that are there specified, certainly there are several of these that the assignees could not maintain. They could not be entitled to recover damages for the injury done personally to the bankrupt, as that injury is alleged in this declaration, from the taking possession of the house, and the remaining in it, and the disturbing the plaintiff in the possession of his dwelling-house. It is quite clear, that such a cause of action would not pass to the assignees under the Statute 6th Geo. 4, c. 16.

But then it is said very powerfully by Mr. *Atkinson* that this action must be supposed to be brought merely for the breaking and entering, and that all the rest is mere aggravation, and that there ought to have been a new assignment. But there can be no new assignment for a cause of action which is not involved in that declaration. A new assignment is not for a new cause of action. A new assignment only informs the defendant of that which he has specified in his plea. It informs him that he is mistaken in supposing that that is the cause of action upon which the plaintiff relies, that there is another cause of action that he has specified in his declaration, and that that is what he means to rely upon. But still it is a cause of action that was specified in the declaration. Otherwise, the new assignment would clearly be bad.

Any cause of action which might be made the subject of a new assignment is, therefore, a cause of action that is

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specified in the declaration, and which v
the assignee, and that therefore the plea

Then, if you are to take it merely t
brought for the breaking and entering, I
whether this simple act of breaking an
be sufficient to enable the assignee to ma
because there may well be a breaking an
out any injury whatsoever to the perso
bankrupt, and without his creditors bein
degree prejudiced by that act. I theref
any mode in which this case is to be cor
is bad.

It is quite unnecessary to enter into
that have been discussed. There is no d
of action which is exclusively confined t
perty will pass to the assignees. In that
difficulty. The difficulty is where there
which has been put during the argument
injury to the person and injury to the
has been no case as yet which has doe

which has been put during the arguments, of the owner of a ship being on board, and the ship being run down on the high seas, and the ship going to the bottom, and the owner escaping and afterwards becoming bankrupt: it is possible that he may maintain an action for the personal injury done to him, and that the assignees may maintain an action for the injury done to the property. But it is not necessary at all in this case to enter into the consideration of such questions. All that we have to see is, whether this plea shews that all the causes of action which are specified in the declaration pass from the bankrupt to the assignees. I think that it does not. I think that it has not that effect, and therefore that the plea is bad, and the judgment ought to be affirmed.

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}
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Judgment affirmed, with costs.

Railway Acts; construction. Vertical deviation. NOTICES given and plans and sections of an

posited, in pursuance of the standing order of Parliament, previous to an application for that act afterwards referred to as to be incorporated therein. A vertical deviation of the level of a railway, calculated with reference to the datum of the plans and sections deposited in pursuance of the Houses of Parliament, is within the limit conferred by the Railway Clauses Consolidation (8 & 9 Vict., c. 33, s. 11), although the deviation is five feet, calculated with reference to the datum of the said plans and sections.

THIS was an appeal from an order of the Court of Session in *Scotland*, and the question raised by the appellants, if allowed to construct the railway in the manner proposed by them, would be exempted from the compulsory powers in regard to the property of the respondent. The appellants, before obtaining the order, proposed to carry their railway across the respondent's residence by means of a bridge fifteen feet four inches below the surface of the ground. The extreme of the bridge across the cutting, the extreme of the bridge should be two feet above the present level of the ground. After they obtained their act, they proposed to

sented a note of suspension and interdict to the Court of Session, on the ground that the appellants were exceeding their statutory powers; and the Court granted *interim* interdict. The appeal was brought against the interlocutor granting that interdict.

The facts were these:—On the 10th of *December*, 1844, the agent of the appellants served notice on the respondent, that application was intended to be made to Parliament in the then ensuing session, for an act to make and maintain a railway, to be called the *Edinburgh and Hawick* Railway; that the property mentioned in the annexed schedule, or some part thereof, in which the respondent was interested, would be required for the purposes of the undertaking, according to the line thereof as then laid out, under the usual powers of deviation to the extent of one hundred yards on either side of the said line; and that a plan and section of the said undertaking, with a book of reference thereto, had been duly deposited at the proper offices.

The schedule annexed to the notice was entitled, “Schedule referred to in the foregoing notice, and which is intended to shew the property therein alluded to, and the manner in which the line of the deposited section will affect the same.” The column of the schedule which described the manner in which the respondent’s property was to be affected by the railway, was headed thus:—“Description of the section of the line deposited, and of the greatest height of embankment, and depth of cutting;” and in the column were inserted the words, “Cutting, fifteen feet four inches; Bridge.”

The notice and the schedule were in accordance with the forms prescribed by the standing order of this House of the 16th of *August*, 1838, No. 220, sec. 4.

By the parliamentary plan deposited in the sheriff-clerk’s office, it was shewn, according to the horizontal scale given on the plan, that the railway would intersect

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of the line below the surface was also 1 on the section ; and it was farther stated dent's approach was to be raised two f railway was to pass under. The parli farther referred to a corresponding which cross-section the level of the r ted, according to the vertical scale, as four inches below the surface of the the height of the bridge which was constructed over this cutting of fifteen was represented as being two feet above of the approach.

The plan and sections were in acco standing orders of *August*, 1838, No. 25, and No. 227, sections 4 and 6.

The respondent, relying on those rep tained in the notice, schedule, and pe and sections), as to the manner in whi railway would affect his property, abstai ing the appellants' bill in Parliament.

That bill, by the first section of whic that the railway clauses and land clau acts (*Scotland*), should be incorpo received the royal assent in *July*, 1845 of *December* of the same year, a notic

Instead of a cutting of fifteen feet four inches, they proposed to make a cutting of only two feet ten inches ; and instead of constructing a bridge, the height of which should be two feet only above the level of the respondent's approach, it was proposed to construct a bridge, the height of which should be about seventeen feet above it. It was also proposed to deviate laterally from the line of railway delineated on the Parliamentary plan, to the extent of sixty-two feet farther from the lodge, and nearer to the house. The respondent then applied to the Court of Session for an interdict, which was granted, after a full hearing both in the Outer and the Inner House.

The question submitted to the House was, Whether or not the *vertical* deviation proposed by the appellants was within the limits of deviation allowed by the act 8 & 9 Vict., c. 33. The respondent did not dispute their power to deviate *laterally* to the extent of 100 yards, according to the fifteenth section of that act. The point in dispute related solely to the extent of *vertical* deviation claimed by the appellants. They insisted that, by the eleventh section of that act, they had the power to deviate vertically to the extent claimed.

By the 11th section it is enacted, that " In making the railway, it shall not be lawful for the company to deviate from the *levels* of the railway, as referred to the common *datum* line described in the section approved of by Parliament, and as marked on the same, to any extent exceeding in any place five feet ; or, in passing through a town, village, street, or land continuously built upon, two feet ; without the previous consent, in writing, of the owners and occupiers of the land in which such deviation is intended to be made, &c. Provided always, that it shall be lawful for the company to deviate from the said levels to a farther extent without such consent as aforesaid, by lowering solid embankments or viaducts, provided that the requisite height of headway, as prescribed by act of

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reciting that plans and sections, showing levels thereof, and also books of reference deposited with the sheriff clerks of the county in which it was to pass, it was "enacted that the provisions in this and the said recited acts should be lawful for the said company to maintain the said railway and works in the lands delineated upon the said plans, and upon the said books of reference, and to enter upon such of the lands as shall be necessary for

Mr. Stuart and Mr. Bethell for the applicant.

The question in this case is, whether the respondent is entitled to exercise the powers were, by their proposed operations, except the statutory powers of deviation. By the 16th section of the special act, after reciting that "plans and sections showing the lines and levels thereof deposited with the sheriff-clerks of the county in which it was intended to pass, it was enacted that the provisions in this and the said recited acts should be lawful for the company to maintain the said railway and works in the line and upon the lands delineated upon the said plans." One of the recited acts is the Statute in Clauses Consolidation Act, 8 & 9 Vict. c. 20, section of which enacts, that it should be lawful for the company to deviate from the line of the railway in such cases as may be necessary for the purpose of avoiding any obstruction to the railway.

yards "from the *line* delineated in the plans so deposited." The appellants have deviated $61\frac{1}{2}$ yards from that line, and no objection is made to that lateral deviation. The interdict applied to the proposed vertical deviation; the deviation from "the levels of the railway." The "*levels*" shown on the plans and sections deposited with the sheriff-clerks, do not mean the *surface* levels, but "the levels of the railway, as referred to the common *datum* line," for which the Court below, in granting the interdict, substituted the levels of the ever-varying line of surface, and therein misinterpreted the statute. The surface level is not at all referred to in the 11th section of the general act, while the *datum* line, being a line unalterable in level, has been expressly named as the criterion of vertical deviation, and the common standard to which all the general levels of the line are referred.

The height of the railway above the *datum* line, at the Dalhousie Mains terminus, is 210 feet, as marked on the plans, and it is found by actual admeasurement, under an order of the Court below, that the distance between that terminus and the point at which the railway intersects the respondent's avenue, is 11,840 feet, and the gradient of the line being 1 in 75, the height of the railway, above the *datum* line at this intersection would be 157 feet 10 inches, in addition to the 210 feet, making altogether 367 feet 10 inches. But the height as found by actual levelling is 373 feet 10 inches. The height, as delineated on the parliamentary plan, viz., 367 feet 10 inches, being deducted from the actual height, leaves a vertical deviation of 6 feet, which, by reason of the lateral deviation of $61\frac{1}{2}$ yards towards a lower surface, is reduced, by $2\frac{1}{2}$ feet, to a vertical deviation of $3\frac{1}{2}$ feet, while the statute allows a vertical deviation of 5 feet.

The decision of the question depends on the construction of the statutes only. The standing orders of this and the other House of Parliament, in pursuance

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Canal Company (a). [See the other c
the *Lord Chancellor, infra*, p. 731.]

Sir *Fitzroy Kelly* and Mr. *Rolt* for

The standing orders, under which n
railways are given, and plans and secti
are not to be disregarded in the const
acts, although not incorporated in the
pressly recognised in the General Railw
lidation Acts, and in the Special Local
ing orders are framed with a view to gi
public how individual rights are propo
by a railway, and for this purpose the o
(No. 223, sect. 5), requires, that the
compliance therewith, should show “
ground marked on the plan, and the int
proposed work, and a *datum* horizo
surface level, therefore, could no more
in the plan than could the *datum* li
indeed, the surface level is of more i
public, who are interested only to see
each person's land would be affected
operations ; whereas the *datum* line, alt
an unvarying check upon the projecto
tively little interest to the landholder,

would be at the trouble and expense of having the level of the railway, with reference to the *datum* line, calculated and ascertained at the risk of serious damage to his property, if he failed in accuracy, although, from the representation given of the level with reference to the surface of his lands, he may not have seen any cause of fear.

The 16th section of the appellants' act recites, that "plans and sections of the railway, showing the line and levels thereof," had been deposited. The only meaning of such a recital is, that the railway was to be formed according to that line and to these levels; and by the use of the plural word "levels," the level with reference to the surface, as well as the level with reference to the *datum* line, must have been embraced; for there were no other levels to which that word in the plural could have reference.

The 11th section of the Railway Clauses Consolidation Act, make it unlawful "to deviate from the levels of the railway, as referred to the common *datum* line described in the section approved of by Parliament, and as marked on the same." Those words cannot be read as if the levels meant were those referred to the *datum* line described on the section, and marked upon the section; there are, in fact, no levels marked upon the *datum* line. The levels in question, therefore, must be not only those referred to the *datum* line, but those marked upon the section, and these will include the level with reference to the surface, as well as the level with reference to the *datum* line. If the plan and section had been correctly drawn, and the two levels correctly represented, a deviation from the one would necessarily infer a corresponding deviation from the other, to be corrected only by the variation of the surface; and inasmuch as the difference between the surface level at the original point of intersection, and the surface level at the new point of intersection, is only 1 foot 11 inches, that, deducted from 15 feet 4 inches, the depth of the original proposed cutting, would leave 13

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The Lord Chancellor (Lord Cottenham) of very great importance, as affecting the right. The first question to be considered is, with respect to applications for interdicts or injunctions in *England*, as applicable in that kind?—the case on the part of the respondent a plan was exhibited to him and to the judges on the passing of the act under which the railway was intended to be made, which plan showed that the railway would pass over his land in a trench more than 15 feet from the surface.

The respondent alleges that, giving faith to the statements, he had, as he naturally might, conceived as to what course he was to pursue in the supposed state of circumstances, as shown by that plan; and that now the railway company have only deviated, which they had a right to do, from that line within the prescribed distance, which was 5 feet, but they also propose to deviate beyond that distance, which is the limit of the vertical deviation authorized by act of Parliament; that they propose to pass the railway over the surface by a space exceeding the 5 feet.

The railway company say that they do not think they are actually coming nearer the surface to a greater extent than the 5 feet, but they

with reference to that *datum* line. They say they are within the distance,—that is, within the 5 feet of the line laid down upon those plans, measured with reference to the *datum* line,—and they contend, therefore, that they are within the provisions of the act of Parliament, and that they are not deviating beyond what that act authorises.

Now, as to the effect of plans exhibited previous to the contract being made, or previous to the act of Parliament being obtained, it does seem, from cases which have occurred both in *Scotland* and in this country, that the rule of the Courts in the one country and in the other is no longer a matter of any doubt or dispute. If a contract or an act of Parliament refer to a plan, to the extent that the act refers to the plan, and for the purpose for which the act or contract refers to the plan, undoubtedly it is part of the contract or part of the act; about that there is no dispute. A contract or an act of Parliament either does not refer to a plan at all, or it refers to it for a particular purpose. It has been contended, both in *Scotland* and in *England*, that the defendants in the suit, or those who claim the benefit of the provisions of an act of Parliament, previous to the enactment being made or the contract being concluded, have represented that the works are to be carried on in a particular mode, upon a plan shown previous to the powers being obtained under the act, or the contract being concluded, and that the party obtaining the act, or obtaining the contract, is bound by such representation.

There was a case very much considered in *Scotland*, the case of *The Feoffees of Heriot's Hospital v. Gibson* (b), and several cases have occurred in the Courts of Equity in this country. It was my fortune to have to consider the matter very minutely in the case of *Squire v. Campbell* (c), in which I thought it my duty to review all

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(b) 2 Dow. 301.

(c) 1 Myl. & C. 459.

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the cases that had occurred in the one country and in the other, for the purpose, if possible, of establishing a rule which might be a guide on future occasions when similar cases should occur, and I found that certainly, what has been very much the opinion of the profession in this country, namely, that the parties were bound by the exhibition of such plans, had met with a very wholesome correction by the doctrine laid down by Lord Eldon and Lord Redesdale in the case of *Heriot's Hospital*, a case coming from the Court of Session, and decided by this House. Under the authority of that case, where the point was very distinctly raised and deliberately decided upon by those two very learned Lords, I came to the conclusion that there was no ground for equitable interposition.

Now, my Lords, not relying upon the authority of *Squire v. Campbell*, but relying, as we are bound to do, upon the case of *The Feoffees of Heriot's Hospital*, this being a decision of this House, I consider that this is the rule to which the Courts of this country, and the Court of Session in *Scotland*, and this House, must hereafter adhere. Taking that then to be the rule, in examining the facts of this case, and the act of Parliament upon which the question turns, we are not to look at what was represented upon the plan, except so far as its representation is incorporated in and made part of the act of Parliament; and the real question, therefore, turns upon this, whether the act of Parliament does or does not make the *datum* line and line of railway, with reference to the *datum* line, the subject matter of these enactments, and the rule by which the rights of the parties are to be regulated; or whether it also includes the surfaces—which, in this instance, accidentally no doubt, had been very much misrepresented upon the plan.

We are first of all, then, to refer to the act of Parliament under which this railway is to be carried into effect and the enactment is in the 16th section. I may here

observe, before I refer to that section, that every thing which is out of the act is to be found in the standing orders of the one House or the other, and the plans which are required to be exhibited by those standing orders, except so far as they are made part of this act, are, as I apprehend, entirely out of the question; because though it may be very inconvenient that standing orders of this or of the other House should require plans to be exhibited, containing matters which are not binding between the parties; but still when we are looking to what the rights of the parties are, we can only look to the act of Parliament by which those rights are regulated. Plans or proceedings previous to the enactment, can have no effect upon the enactments themselves.

Now the 16th section of the act of Parliament says, "And whereas plans and sections of the railway, shewing the line and levels thereof, and also books of reference containing the names of the owners and lessees, and occupiers of the land through which the same is intended to pass, have been deposited with the sheriff-clerks of the counties of *Edinburgh*, *Selkirk*, and *Roxburgh*; be it enacted, that, subject to the provisions in this and the said recited acts contained, it shall be lawful for the said company to make and maintain the said railway and works on the line and upon the lands delineated in the said plans, and described in the said books of reference, and to enter upon, take, and use such of the said lands as shall be necessary for such purpose." There is a parliamentary authority, which of course cannot be disputed, that the parties are to be at liberty to make "the railway and works on the line and upon the lands delineated on the said plans." We have therefore to look only to what is the meaning of the word "line" as used in this act of Parliament. The reciting part of that section speaks of "line" and "levels." It is, therefore, necessary to look to other acts—the general acts being required to be in-

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incorporated and made part of this act—to see what meaning of those terms used in this section; this is a power under which the railway company act; and if they bring themselves within the meaning of the enactment, explained by provisions and sections found in other acts of Parliament, beyond all doubt they are then performing the powers which the Legislature intended to vest in them.

In the act 8 & 9 *Vict.*, cap. 33. for consolidating one act certain provisions usually inserted in acts relating to the making of *railways* in *Scotland*, we have sections to which it appears to me to be necessary to refer; the 7th and 8th I only refer to for the purpose of observing that the plans, which are there referred to, cases, where, after the original plans have been drawn, it has been found that they contain certain errors, then they define the means by which the parties are to correct those errors, and to make their plans correct. The 11th section contains this provision:—"In the railway it shall not be lawful for the company to deviate from the levels of the railway, as referred to in the common *datum* line, described in the section approved by Parliament, and as marked on the same, to an extent exceeding in any place five feet, without the previous sanction in writing of the owners and occupiers," &c. It provides for the case of passing through a town, and

that power. Then come the enactments of the 16th section of the local act :—" That, subject to the provisions in this and the said recited acts contained, it shall be lawful for the said company to make and maintain the said railway and works in the line and upon the lands delineated in the said plans." And then it goes on to enumerate the works which the company is to be authorized to make.

Now, taking these enactments—because I do not find that the other acts contain any provisions which are very material to be attended to—taking those two enactments together, it appears to me to be quite plain, that the Legislature intended, in speaking of lines and in speaking of levels of the intended railway, to confine those provisions, and to refer them to the *datum* line, and not to any other representation. Although great convenience may arise from the plans and sections required by the standing orders to be exhibited previous to the application to Parliament for powers to make the railway, representing the surface as well as the *datum* line, and the intended line with reference to that *datum* line, yet if any difficulty should arise as to the construction to be put upon the sections to which I have referred, we must recollect that Parliament must be supposed to have had before it not only the line as explained in these sections, but also the other surface line which is exhibited in the plan. But the enactment totally disregards the surface line, and is confined in terms to the *datum* line, and to the line of railway to be measured and ascertained with reference to its distance from that *datum* line.

I say then, my Lords, that a case does arise upon these provisions of the acts in which the plan indeed is referred to, but the plan referred to is in the terms of the act of Parliament referred to, only to ascertain the line of the railway with reference to the *datum* line. It is not referred to with reference to any surface level. The plan, therefore, is entirely out of the enactment, and is not to be referred to for the purpose of construing the enactment

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of *Heriot's Hospital*, and acted upon Chancery in the case of *Squire v. Camp* difficulty in coming to the conclusion that of that principle will necessarily lead to of the clauses to which I have referred binding to the extent of the *datum* line railway measured with reference to that it is not to be referred to for the purpose because the act does not apply it for the cautiously confines the enactment to that which I have already referred. Acting, the principle so established, and with construction which I conceive to be that be put upon these sections—although greatly lament the hardship which, in these circumstances have imposed upon in having his land interfered with in a did not at all anticipate,—yet when we consider whether the Court of Session is suspending the further acts of the company to the mode in which they were to perform are bound to look to see what are the powers acts vest in the company, and, according which I have formed, for the reason which explained. I come to the conclusion. that

very considerable doubts as the argument proceeded, and I acknowledge that I come to the conclusion at which I have arrived with very great reluctance. It seems to me to be a case of very great hardship upon Mr. *Tod*. He, looking to the plans lodged under the standing orders of the House of Commons, and also of this House, had every reason to believe that there was no danger of the railroad passing his approach, in a manner that could seriously affect the convenience or amenity of his place of residence, and he might very reasonably abstain from offering any opposition to the bill before Parliament, upon that representation. But, when we come to consider what the law upon the subject is, I feel bound to concur in the opinion which has been expressed by my noble and learned friend.

The first question, as it seems to me, to be considered is this: What is the legal construction of the acts of Parliament? Does the company, or does it not, propose to exceed the powers which the acts of Parliament confer upon it? Now, it is admitted that, if the deviation is to be calculated from the *datum* line alone, they (the company) have not, because neither vertically nor laterally do they exceed the powers of deviation which are conferred upon them by the acts of Parliament. Well then, that raises the question whether those powers of deviation are to be calculated from the *datum* line alone, or whether the surface line is to be taken into consideration? and my opinion is (and I have no doubt at all about this—I never had much doubt about it) that the act of Parliament does refer every thing to the *datum* line. I think it is evident that the 11th section of the 8th and 9th *Vict.*, chap. 33, clearly makes this *datum* line alone that which is to be regarded.

The word “levels” in the plural number really does not, in my opinion, at all include the surface levels. It means merely the levels on the *datum* line, which point out the course the railway is to go. If that be so, the

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an act of Parliament, by which they intended that the railway should be laid four feet four inches below the surface of the ground at the point of intersection; and that the approach which his approach would pass over should not be more than three feet. But this was an intimation on the part of the company that it was their intention. An act of Parliament of this kind was made in *Eldon*, and by all other Judges who have considered the subject, been considered as a contract. It was a negotiation: it was a contract. What took place; we must look to see what was. The contract is to be gathered from the act of Parliament; and that brings us to what I first considered—What is the contract of Parliament? That act of Parliament is considered as overruling and doing away with what had taken place prior to the time the Parliament passed, and renders the proposal of the company pending the act of no avail. Many cases have occurred in the Common Law, in which it has been held that what takes place before a written contract between parties, is entirely to be disregarded in the contract by which they are bound.

that the railroad passing his approach should be fifteen feet four inches (with a power of vertical deviation, perhaps)—that it should be of that depth in crossing his approach, and he should be able to pass it by a bridge not more than three feet—would not have acceded to such a clause as a matter of course; for it is only reasonable that his property should be protected in this manner, and that he should be saved from such a deformity being erected in the sight of his dwelling-house, which would for all time to come be a great nuisance there, and might diminish its value. But he abstained from introducing any such clause, and therefore he must be considered as having acceded to the company having all the powers which the act of Parliament confers upon them. The act of Parliament confers on them the powers of deviating a hundred yards laterally, and five feet vertically, without any qualifications whatever. The company do not propose to deviate to a greater extent: they are, therefore, within the powers; they are not exceeding the powers which are conferred upon them; they are acting according to the contract that must be supposed to be entered into by them with Mr. *Tod*.

I have read with great attention the case of *The Feoffees of Heriot's Hospital*, and also the admirable judgment of the Lord Chancellor in *Squire v. Campbell*, in which all the cases upon this subject are reviewed; and these cases remove all doubt from my mind, and induce me now, I may say without hesitation—although, I again repeat, with very great reluctance—to come to the conclusion, that, neither upon the construction of the act of Parliament, nor upon the ground of the representation that was made, is there any sufficient reason for supporting this interdict. I therefore agree in the judgment which has been expressed by my noble and learned friend.

It was then ordered that the interlocutors be reversed, and the cause remitted to the Court below.

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ment of.
Notice.* Under the 9 Geo. II., c. 5 (Irish Statute), payment of a judgment to the assignee, without notice of the judgment, is to be deemed payment thereof.

The registration of the assignment under this statute operates as notice to the assignor.

The situation of a comoror under this statute is a mortgagor, under the (English Statute)



THIS was an appeal against a decree of the Court of Chancery in Ireland, made in a suit for the redemption of a mortgage. The circumstances which the suit arose were these:—In the year 1823, the respondent became entitled, by devise of his uncle, *John Ferrall*, to certain estates in the county of *Roscommon* amounting to an annual income of nearly 8,000*l.* He had previously incurred debts to a large amount, the largest particular owed to one *Patrick Nolan*, by mortgage, the sum of 4,026*l.* 8*s.* 10*d.* To secure the payment of this debt, the respondent executed an ordinary mortgage for the amount, conditioned for the payment of the principal and interest. The other creditors of the respondent were pressing for payment of their demands,

against the respondent, and obtained writs of *custodiam* upon them to the amount of about 15,000*l.* On the return of the respondent to *Dublin*, in 1828, a dispute arose between him and *Nolan* as to the amounts which *Nolan* had in the mean time received from the estates of the respondent, and as to the balance between them. This dispute was referred to the arbitration of a person named *Strickland*, who, in *December 1829*, awarded that there was still remaining due from *Ferrall* to *Nolan* the sum of 15,396*l.* 5*s.* 9*d.*, on a general balance of their accounts. This award was disputed by both parties, by *Ferrall*, because a sum of 3,000*l.* had been, as he alleged, improperly allowed to *Nolan*, and by *Nolan*, because the sum secured to him by the judgment of *November 1823*, had not been taken into account. These disputes continued for some time; but at length, in *July 1831*, it was arranged that the 3,000*l.* objected to by *Ferrall*, should be struck out, and, on the other hand, that money due on the judgment of *November 1823*, should be brought into the account, and that if *Ferrall* could procure the assent of his other creditors to take their demands out of the residue of the rents, *Nolan* would accept the sum of 3,000*l.* yearly until all his demands should be paid off, but without prejudice to the *custodiam* obtained by him. The respondent had been arrested by one of his other creditors, and was at that time in prison. On the 25th *June, 1834*, he executed a deed of trust for the purpose of raising money to pay off his creditors. By this deed he vested his property in two persons, named *O'Conner* and *Vevers*, who were to raise a sum of 15,000*l.* for payment of the other creditors, and to pay a sum of 2,500*l.* a-year to *Nolan*, till *Nolan's* claim should be liquidated. *Nolan* consented to this arrangement and was a party to the deed. Money was afterwards raised on annuity, and *Nolan* joined in the securities given to the annuitants. *Nolan* himself was, during at least a part

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of this period, in embarrassed circumstances. He owed sum of 1,400*l.* to *Brown and Co.*, and to secure it he assigned to them the judgment of *November 1823*, and the deed of assignment, dated the 9th *January, 1833*, recited that the whole sum of 4,026*l.* 8*s.* 10*d.* was at the time remaining unpaid. *Brown and Co.* were afterward paid off by means of a loan of 1,900*l.* obtained by *Nolan* from one *Robert Gray*, to whom the judgment of *November 1823* was, in *July 1833*, assigned as security. The deed of assignment stated that a sum of 3,844*l.* was the due on the judgment for principal and interest. Under the trust deed of the respondent's property, executed by *O'Conner and Veevers*, Messrs. *Stewart and Kincaid* had been appointed receivers, and from them *Nolan* had received various payments according to the trusts in the deed. On the 4th of *December, 1833*, he obtained from them a memorandum to the following effect:—"Mr. *Nolan* and Mr. *Kincaid*, to prevent further misunderstanding, have agreed to the following arrangements: to payments: viz., Mr. *Nolan* to receive at present 1,250*l.* and on the 3rd *March* next, 750*l.* more: on the 1st *June, 1,000*l.**, and 1st *December, 1,000*l.**; Mr. *Nolan* not to be considered as thereby waiving his right to dispose of, as he may think proper, any surplus that may be at the end of the year after the above payments: and in case Mr. *Nolan* should, in the mean time, accept the re-charge of 3,000*l.*, under the deed between him and Mr. *Ferrall*, the above quarterly payments then to be reduced to 750*l.*" The payments under the trust deed were duly made by *Stewart and Kincaid* down to the 1st *December, 1834*. On the 31st *July* in that year, *Nolan* having obtained advances from the appellants, his bankers and desiring to obtain further advances from them, procured *Stewart and Kincaid* to address to himself a letter in the following terms:—"You will please mention to Messrs. *Boyle and Co.* that we shall pay them, pursuant

to the memorandum between Mr. *Kincaid* and you, on the 1st *September* next, 1,000*l.*; on 1st *December* following, 1625*l.*; and every three months, after so long as we continue agents for Mr. *Ferrall's* estates, the sum of 1625*l.*, on every 1st *March*, 1st *January*, 1st *September*, 1st *December* following, until your *custodiam* debt shall be discharged." The memorandum thus referred to was that of the 4th *December*, 1833.

On the 18th *February*, 1835, *Ferrall* filed his bill against *Nolan*, stating that the judgment of *November* 1823, had been paid off, and praying for an account of the rents, and for a receiver. The subpœna to answer this bill was served on *Nolan*, on the 19th *February*; on the 20th he made a third assignment of the judgment of 1823. This assignment was executed in favour of *Boyle* and *Co.*, to secure the repayment of 2500*l.*, previously advanced by them, and such further sum as they might advance. *Nolan*, by this deed of assignment, covenanted with *Boyle* and *Co.* that a sum of 4205*l.* 5*s.* 7*d.* remained due on the judgment for principal, interest, and costs. All these assignments were duly enrolled. On the 11th *June* following, *Nolan* became bankrupt. On the 25th *July*, *Ferrall* filed a supplemental bill, making the assignees of *Nolan* and *Boyle* and *Co.* defendants to his suit. The allegations and prayer of this bill were the same as in the former bill. On the 24th *December*, *Boyle* and *Co.* having previously put in an answer to *Ferrall's* bill, filed a cross-bill against him, in which they went into all the transactions between *Nolan* and the various persons to whom he had assigned this judgment, and declared that the sums secured by the judgment, principal, interest, and costs, were still due, and they prayed that the judgment should be declared valid and subsisting for the amount of their demand, and that an account might be taken, and a receiver appointed. Before the causes came on for hearing, the Court referred it to the Master

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to take an account of what was due on the *custodiam* proceedings, on the award of *December* 1829, and on the judgment of *November* 1823, and the motion for the receiver was directed to stand over till the report had been made. The Master made his report on the 6th *July* 1838, and found that *Nolan* had been overpaid to the extent of 4,982*l.* 1*s.* 5*d.* In *February* 1838, a motion made by *Boyle* and *Co.*, to send back the report to the Master, was refused, with costs, without prejudice however to the rights of the parties to insist, at the hearing of the cause, that the rents received by *Nolan* himself after the assignment of the judgment of 1823, ought not to be applied in payment thereof, as against the assignee of that judgment.

The causes were finally heard before the Lord Chancellor, who, on the 26th *June*, 1839, made a decree, in the case of *Ferrall's* bill, in accordance with the prayer of that bill, and dismissed the cross-bill, with costs (a) This appeal was then brought, and the questions raised upon it, depended on the construction to be put upon the *Irish* statutes, 9 Geo. II., c. 5, and 25 Geo. II., c. 14 (b)

(a) 1 Ir. Eq. Rep. 391.

(b) The 9 Geo. II., c. 5, of which the first four sections are as follows:—

Whereas judgments, statutes-staple, and statutes-merchant, are frequently assigned for valuable considerations, and to protect the purchase of estates, but are no more than equitable securities in the hands of the assignees: and whereas assignees of such judgments, statutes-staple, or statutes-merchant, as the law now stands, cannot revive or discharge the same in their own name but in the name of the conusees of such judgments, statutes-staple or statutes-merchant, or their representatives, which is often attended with very great inconveniences, and the conusee may after such assignment, enter satisfaction on the record of the said judgments, statutes-staple, or statutes-merchant, without the knowledge or consent of the assignee: for remedy whereof be

Mr. *Bethell* and Mr. *Follett* for the appellants.

The judgment here was something which was capable of assignment. It was so if the conusee had a legal

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enacted, that from and after the first day of next Easter Term, where any conusee or conusees of a judgment or judgments, statute-staple, or statute-merchant, his, her, or their executors or administrators, shall assign the same to any person or persons whatsoever, such conusee or conusees, his, her, or their executors or administrators, shall also perfect a memorial of such assignment, under his, her, or their hand and seal, upon parchment or vellum, attested by two or more credible witnesses, which memorial shall contain the name or names of the person or persons to whom the same shall be assigned, and the sum or sums of money mentioned in such assignment or assignments to be remaining due and unsatisfied upon such judgment or judgments, statute-staple, or statute-merchant, with the day and year when such assignment or assignments is, are, was, or were perfected, and that one of the witnesses to such memorial, who shall be a witness to the assignment of such judgment, statute-staple, or statute-merchant, shall make an affidavit at the foot of such memorial of the true perfection of such assignment and memorial, before the respective officer or officers where such judgment or judgments, statute-staple, or statute-merchant, is, are, or shall be entered, his or their legal deputy or deputies, or before any one of the Judges of the Four Courts in *Dublin*, or before any one of the Judges of his Majesty's Courts at *Westminster*, who are respectively hereby empowered to take such affidavit, which memorial and affidavit shall be lodged in the proper office where such judgment, statute-staple, or statute-merchant, is or shall be entered: and the several officers of the said Courts are hereby required to enter such memorial of such assignment, statute-staple, or statute-merchant, in a roll or rolls of parchment or vellum, to be kept for that purpose in such respective office or offices where such judgment or judgments, statute-staple, or statute-merchant, is, are, or shall be entered: and such officer or officers is and are hereby required to indorse on such assignment or assignments the day of the month and year, and hour of the day, whereon such memorial or memorials was or were so lodged

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estate in it. By the terms of the statute, the assignee alone can give a good discharge for it. There is no necessity for notice, for the statute took care to furnish

and proved: and for the more easy and speedy method of finding such assignment or assignments, such respective officer or officers shall enter the number and roll where such assignment or assignments is or are registered, at the foot of each respective judgment or judgments, statute-staple, or statute-merchant assigned; for all which indorsements, entries, and affidavits upon such respective memorial, the sum of six shillings and eightpence shall be paid, and no more.

2. And be it further enacted, that from and after such time as such memorial or memorials of such assignments shall be entered on such roll as aforesaid, it shall and may be lawful for the assignee or assignees of such judgment or judgments, statute-staple, or statute-merchant, his, her, or their executors, administrators, or assigns, and for no other person or persons whatsoever, to revive such judgment or judgments, statute-staple, or statute-merchant, from time to time, in his, her, or their own name or names, and take out one or more execution or executions on the same, in the name or name of such assignee or assignees, his, her, or their executors or administrators, and to sue forth execution or executions thereon, reciting the special matter, and also to discharge and release the same: and also in his, her, or their own name or names, to enter satisfaction on the record of such judgment or judgments, statute-staple, or statute-merchant, in as full and ample a manner, to all intents and purposes, as if the conusee or conusees of such judgment, or judgments, statute-staple, or statute-merchant, his, her, or their executors or administrators, could or might do; and that the conusor or conusors of such judgment or judgments, statute-staple, or statute-merchant, his, her, or their executors, administrators, or assigns, may, upon payment to such assignee or assignees, plead payment specially to such assignee or assignees: and that such assignee or assignees, their executors or administrators, may from time to time, assign the same over in manner aforesaid, and the respective offices in such assignment or assignments shall be proved and registered in manner as aforesaid: and such assignee or assignees may revive and sue out execution or executions, in

the conusor of the judgment with the means of knowing whether any proceedings had been taken to vest the rights created by it, in any other person but the original

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their own name or names, and discharge and acknowledge satisfaction on such judgment or judgments, statute-staple, or statute-merchant, in manner aforesaid, any law, usage, or custom to the contrary in anywise notwithstanding.

3. Provided always, that the conusor or conusors of such judgment or judgments, statute-staple, or statute-merchant, his, her, or their heirs, executors, or administrators, shall have the same remedy and defence, both in law and equity, against the assignee or assignees of such judgment or judgments, statute-staple, or statute-merchant, his, her, or their representatives, which he, she, or they could or might have had against the conusee or conusees of the same, his, her or their representatives, in case no such assignment or assignments had been made.

4. And be it further enacted, that it shall and may be lawful for the assignee or assignees of any judgment or judgments, statute-staple, or statute-merchant, already assigned, his, her, or their executors or administrators, to perfect such memorial, in manner aforesaid, and to have the same entered, and to revive and sue out execution or executions, and to acknowledge satisfaction in his, her, or their name or names, and assign such judgment or judgments, statute-staple, or statute-merchant, in manner aforesaid.

This was amended by the first section of 25 Geo. II., c. 14, which is as follows:—

Whereas some doubts have arisen upon the construction of an act of Parliament, passed in this kingdom, in the ninth year of his present Majesty, entitled “An act for the more effectual assignment of judgments, and for the more speedy recovery of rents, by distress,” so far as the said act relates to the assignment of judgments and statutes in the several courts of law therein mentioned, for the removing of which doubts be it declared and enacted, that every assignee or assignees of every judgment or judgments, statute-staple, or merchant, that are now assigned, or which hereafter shall be assigned on record, by virtue of the said act, his, her, or their executors, administrators, or assigns, may

do so would be a benefit both to the conusee. But they will not do so, if bound to do under the statute, is superior of giving notice to the conusor. Not impolitic than a judicial declaration there added to the registry acts, not require Legislature, but appended to them by the Courts. Then comes the question, whether the statute did require that notice should be given. I have no argument against such a supposition; it is express and minute in the directions, and that it does not say anything of *Campbell*.—Suppose a lease for years re-assigned to C.; B., the tenant, not knowing of the assignment, goes on paying rent to A.: could he sue for the rent?—He could. [Lord *Campbell*.—

not only revive such judgment or judgments, from time to time, in his, her, or their own hands, but also take out one or more execution or executions thereon, every of his or their demands thereon, as by the statute, other things, is directed, but that also such judgments, of such judgment or judgments, statute or statute or hereafter to be assigned by virtue of the statute, their executors, administrators, or assigns.

pleaded *riens en arrear*, would he not be entitled to the benefit of the payments he had made? might it not be contended that A. made C. his bailiff to receive the rent?] No; for the covenants would run with the land, and on the transfer of the reversion they would be transferred too. The obligation to give notice is purely an equitable doctrine. It arises from the circumstance of the infirmity of an equitable transfer. Hence an obligation to perfect it by notice. But where the transfer is a legal and not an equitable transfer, that necessity does not exist. The transfer here is legal. It is unknown to the law to require notice for the perfection of a legal title. The law has provided for the conusor the means of knowledge, and all that is required of him is to look at the registry book, and see to whom the property belongs. But if otherwise, a Court is not entitled to decide on the consideration of mere inconveniences. All that the Courts have a right to consider is, whether the Legislature intended to make judgments legally assignable.

As to the necessity for notice, that is explained in the case of *Jones v. Gibbons* (c), where the Master of the Rolls laid it down that notice to the party who is to pay is requisite for the perfection of the transfer, and that this was requisite, as otherwise the debtor might pay the original creditor. But though that may be true as to equitable titles generally, it cannot be so here, where the statute has given a statement of what it is necessary for the assignee to do, and then declares that having done what is so required, that he shall be considered to all intents and purposes in the place, stead, and condition of the assignor, and shall have the same remedies against the conusor as the conusee. [Lord Cottenham.—But your assignment was in 1835, and at that time it is said that, in fact, nothing was done. If so, there is an end of

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counsel were stated very fully the fact having come to the deed executed by *Nolan* after the award, proceeded to and was conclusive as against the respondent deed is admitted by this deed to be unlawful which takes place under it. The appeal starts with the acknowledgment of the respondent judgment was not touched by the account and taken by *Strickland*. Of all the property expired with the demise of *George IV* renewed, and that for 4026*l.* was not on *custodiam* for 20,000*l.* was that under continued in possession. That did not affect it Till the 12,376*l.* had been satisfied, notwithstanding that *custodiam* could be attributed to the judgment of 4026*l.* Another deed was which *Nolan* transferred to *Kincaid* the subject of which he was in possession of *Kincaid* entered under a *custodiam* writ 3500*l.*, borrowed from him by *Nolan*. was in possession, it was agreed that he was agent and receiver of *Ferrall*, in the being able to raise money for the payment. The memorandum of agreement entered *caid* on behalf of *Ferrall* is a most important when considered in connection with the

Nolan, in respect of the award debt, the sum of 5000*l.* as expressly admitted by the agent of the respondent. Again, the assignment of *January* 1833, shews that the judgment debt was not affected by that instrument. Now, in the accounts taken in Master *Goold's* office, the report shews that in *January* 1833, the sum of 2404*l.* 2*s.* 1*d.* was due to *Nolan*, without reference to the judgment. [Lord *Cottenham*.—Does it not appear from the deed of 1834 that the sum in the award covered all the debts? No distinction is there taken between the different sorts of debts.] That vague statement of the debts must be corrected by reference to the deed of 1831. There were in fact two sorts of debts, the award debt and the judgment debts. There was a subsisting account in respect of *Nolan's* receipts. The appellants were about to advance money on the judgment debt, and they requested the agents to say whether they were prepared to pay the debts which appeared by the deed to be existing, and they were told that the debts would be duly paid. That representation was confirmed by the deed of *Ferrall* himself by which *Nolan* was to receive annually 2500*l.* On this the appellants lent their money, and received the transfer in security. The question then is, whether the accounts must not proceed on the basis that at the time these representations were made, there was a debt due according to those representations. That is the whole of the case on the facts, and it is not possible to doubt that the appellants' title will, on them, be found to be distinctly and clearly established. [Lord *Campbell*.—Suppose an action brought by the assignee of the judgment in his own name, the conusor would plead payment, and that plea would go before the jury. The question left to the jury would then be, whether the assignee had held out to the world the conusee of the judgment as his agent to receive the money.] The facts of the case here are an answer to such a supposition.

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assignee was held bad on special demurrer, for not averring that the payment was made after the assignment to him. It has arisen with reference to the grantee of a reversion suing for rent due from the lessee of the land to the grantor of the reversion. The 32 Hen. 8, c. 34, did, in *England*, in the case of a mortgage, exactly what has been done in *Ireland* by the 9 Geo. 2, c. 5, in the case of a judgment, and declared that, for all purposes, the assignee shall stand in the place of the mortgagee. On this provision of the *Irish* statute arises the question whether it is necessary for the purpose of the assignee standing in the place of the conusee, that notice should be given to the conusor. There can be no doubt that it is necessary. It would be fraudulent if it was not so. [Lord *Campbell*.—Does not the Statute 4 Anne, c. 16, which takes away the necessity for attornment, provide that notice shall be given ?] It does, and it must be admitted that that appears to be opposed to the necessity of notice here, since notice would seem not to have been necessary till made so by the Statute of Anne. But then the Statute of Hen. 8, said nothing of attornments ; and yet Lord *Coke*, commenting on this statute, shews attornment to have been necessary, for he says (*f*), “ If a lease for life be made, reserving a rent upon condition, &c., the lessor levies a fine of the reversion, he is grantee or assignee of the reversion ; but without attornment he shall not take advantage of the condition, for the makers of the statute intended to have all necessary incidents observed, otherwise it might be mischievous to the lessee.”

The necessity of attornment is shown by *Mallory's case* (*g*), where it is said to have been thus resolved : “ Though the words of the Statute 32 Hen. VIII., c. 34, are general (as all other persons, being grantees or assignees to or by any other person or persons, &c., shall

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(*f*) Co. Litt. 215, a.

(*g*) 5 Co. Rep. 111, 112, b.

assignee, it is to be understood of such who has all the ceremonies and incidents to such assignee, and not to take away a circumstance which the law requires, contrary to the common law as it is agreed. 28." Notice is now necessary for the which attornment was formerly required.

In like manner in the law of Scotland chose in action may be assigned, there is no notice, which is in fact a notice, before he can exercise his full rights acquired in the debt. Notice was not required, the assignor could with safety pay a single farthing of interest without first searching the register of the last assignment had been made. The duty of imposing such a duty on him is manifest. The assignor must be treated as the agent of the creditor. The statute produces no other effect than that a registered deed has no effect: a registered deed is effectual for certain purposes and in a certain manner. The statute was meant to protect the creditor called upon by different persons, having the same debt to pay the same debt. The assignee also must be called upon to give judgment and give a discharge for the same debt. The provisions of the section which give the assignee the right to give a discharge for the same debt.

the act of registration should be notice to all the world, it would, like other statutes where such an intention exists, have expressed it. Its silence on this point shows that there was no such intention. The sole object of the second statute was to supply an omission from the first, and to enable the assignee to proceed in his own name, and to revive the judgment, and to recover the same. Having done this, it describes what is the force of the statute, by declaring him to stand in the "place, stead, or condition of the assignor." The first section of the first statute merely enables the assignee to invest himself with his full right as against the assignor, and the second section shows that after that he must take other steps to enforce his rights as against the conusor, and there is scarcely one of them that does not, as matter of necessity, imply notice to the conusor. [Lord *Cottenham*.—Suppose the legal title against you, do you set up in this bill this equitable right by way of defence?] The bill states that the assignment is void: not merely void in law, but void. The bill was at first against *Nolan*—there was then no assignment; the assignment was made pending the suit. The assignee, therefore, came in, subject to all the equities then existing in favour of the conusor. It is submitted, first, that this assignment never was perfected at all, for the law would intend that notice was necessary to perfect it; secondly, that a Court of Law would hold that the conusee here was, until notice, the agent of the assignee, and that payment to one would bind the other; and, thirdly, that that being so in a Court of Law *a fortiori*, it is so in equity, since otherwise the conusor might be compelled, by a fraud between the conusee and the assignee, to pay the debt twice over. This last ground of argument is rendered so much the stronger, by the fact that there was no new advance on the faith of this judgment, but that the assignment took place to cover an old liability.

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The case of *Chambers v. Goldwin* (h) was relied on by the other side, to show that when a mortgagee assigns a mortgage, if he produces the deed on which there is an acknowledgment that a certain sum is due, the mortgagee is bound by that recital. The doctrine of that case is misunderstood when such is stated to be its result. A person is bound by a statement which he makes, and by which he induces another party to enter into a transaction in the way of agreement, but he is not bound in the same manner where he merely executes a deed, in which a particular statement is found. The case of *Chambers v. Goldwin* did not lay down any general doctrine, but was determined on its own peculiar circumstances—Lord Eldon saying, “this bill not imputing specifically any error to the accounts settled between the original mortgagee and the original mortgagor, the latter, though he may try with the mortgagee himself, the question of error, as to the account of that mortgagee, cannot do so with the assignee.”

On the whole, it is submitted that the debts in *custodiam* had no priority over the debt on the judgment, but on the contrary, that the latter was an execution which the tenants were bound to obey, and in respect of which the payments they made being compulsory, were protected; and that at the time of the assignment of the judgment to *Brown and Co.*, the judgment was by these payments satisfied. The judgment of the Court below is warranted by the proper construction of the statutes and by the rules of equity, and on the facts of this case, no other judgment could be pronounced. That judgment must be affirmed.

Mr. Bethell in reply.—Attornment was only necessary by the common law. Where a statutory right was granted

(h) 5 Ves. 834 ; 9 Ves. 254.

ted, it became unnecessary. Lord *Coke* gives (a) the reason of it. He says it was meant to protect the tenant against a transfer of his service to his greatest enemy. Again, Lord *Coke* says (b) that if a grant is by fine, attornment is not necessary, for the party is in, by 27 Hen. VIII., c. 10, by act of law. And he afterwards adds (c), "and so it is, and for the same cause, if a man at this day, by deed indented and enrolled according to the statute, bargaineth and selleth a seignory to another, the seignory shall pass to him without any attornment: and so it is of a rent, a reversion, and a remainder." Here the assignee is in by force of the statute, and notice is not necessary. If notice was required in all cases, the provisions of the statute would be rendered nugatory.

Nor in this case ought notice to be required on the equities as they existed between the parties. The debt to *Nolan* was acknowledged at the time the assignment was made—every thing that had passed between the several parties shewed that he had a valid subsisting claim—a claim not then disputed—it was assignable by law, and having been assigned and duly enrolled, the payments made to any other persons but the assignee cannot be taken into account against them.

The Lord Chancellor.—In this case the appellants filed their bill on 24th December, 1835, praying that the judgment of Michaelmas Term 1823 might be declared a valid security for the appellants' demand, and that an account might be taken of what was due from *Ferrall* on account thereof, and that what might be found due from *Ferrall* on account of the said judgment, might be paid by him in satisfaction of the appellants' demand.

The bill by the respondent against *Nolan* was filed on the 27th February, 1835, but the appellants were not made parties to this suit till the filing of the supplemental bill

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(a) Co. Lit. 309 a.

(b) *Id.* 309 b.

(c) *Id.*, *ib.*

the award (deducting a sum of 3000*l.*), a of 1823; that is, assuming the 12,396*l.* 4026*l.* 8*s.* 10*d.*, for which the judgment have been due, a supposition most of appellants, who claim through *Nolan*.

The Master made his report on the 6 finding 4962*l.* to be due to *Ferrall* from report no exceptions were taken, although made to refer the matter back to the further report as to the judgment-deb 1833, the date of the assignment to *Bro* was refused; and upon the order so re back to a fresh reference, there is no a ter's report therefore is conclusive bet and by the account set out in the sche it appears that, even upon the principl account was directed to be taken, the due from *Nolan* to *Ferrall* at the tir filed their bill.

If, therefore, the question had been be *Ferrall*, there could be no doubt as to the decree; but the appellants contend, judgment of 1823, that they ought not any transaction between *Nolan* the conu the consuror of the judgment; and t

directed to inquire whether any part of the judgment-debt of 1823 was due, at the date of the assignment to *Brown and Co.*, through whom the appellants claim. The result of such an inquiry would probably have put a short and certain end to the contest between the parties; but that not having been done, it is necessary to consider what is the effect of the transaction between *Nolan* and *Ferrall* subsequent to the assignment of the judgment to *Boyle and Co.*, upon the supposition that some part, at least, of the judgment was then due.

On the 22d *February*, 1825, *Nolan* obtained a grant *in custodiam* of the estate of the respondent, whom he had outlawed upon the judgment of 1823; and he was put in possession, at what precise time does not appear, but in his affidavit of 27th *November*, 1828, he states that he was in quiet possession of the estate, and in receipt of the rents.

In 1826 and 1829, other grants *in custodiam* were obtained by him, but for debts not originally due to him from *Ferrall*. Upon the demise of the Crown in 1830, the two last *custodiams* were renewed, but not the first; the possession, however, appears to have continued, founded, as he states in his affidavit, upon the judgments of 1825 and 1827.

It was contended, on the part of the respondent, that this possession, and the letter of the 31st *July*, 1834, from *Stewart and Kincaid*, to *Nolan*, authorising a communication to *Boyle and Co.*, and mentioning *Nolan's custodiam*, amounted to notice that *Nolan* was in possession as custodee. I do not find any proof that the contents of the letter were communicated to *Boyle and Co.*; and if the possession gave notice of his title, it appears that such title was, in 1833, under the *custodiams* of 1826 and 1829; that of 1825 not having been renewed, although the deeds of 1831 and 1834, refer the possession to all the *custodiams*.

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own names, and to discharge and re
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So far the act is for the benefit
against the assignor or conusee, bu
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the contrary. The assignee may wit
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merely giving to the conusor notice

ment. In case of mortgages, it is admitted and proved, by the cases referred to, that a mortgagor may safely pay to the mortgagee, having no notice of any assignments; but it is said that there the debt is not assignable, whereas a judgment-debt may, by the statute, be assigned. A debt, though not assignable at law, is assignable in equity; but the assignee, not giving notice to the debtor, cannot dispute any payment he may make to the original creditor, and how do the cases differ? In both, the mortgagor or the conusor, the person originally liable, acts in obedience to the original right, having no notice of its transfer to another. It would be strange if he were held to be liable in the one case, and not in the other.

It appears to me, therefore, that the respondent, by the principles of justice, by decisions in analogous cases, and by the terms of the statute, is entitled to the benefit of these payments.

It was argued, however, that the respondent had become liable, by representations made by his agents, by which the appellant had been misled, and by which, therefore, the respondent was bound. The representation relied upon is the memorandum of 4th *December*, 1833, and the letter of 31st *July*, 1834. Assuming that these documents, or the substance of them, was communicated to Messrs. *Boyle* and *Co.*, they would relate only to certain payments, until *Nolan's custodiam* debts should be discharged, and could not, therefore, affect the question as to the application of payments after such debts had been discharged; and before the effect of these representations can be discussed, it must be proved that Mr. *Kincaid*, who made them, was agent to *Ferrall*, and either by direct authority, or from the nature of his agency, was competent to bind *Ferrall* by his representations and promises. In all this the appellant wholly fails. *Stewart* and *Kincaid* were receivers under the deed of 25th *June*, 1834, for which *O'Conner* and *Veevers* were trustees, and

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for *Ferrall*.

I am of opinion that the appellants showing grounds for impeaching the ought to be affirmed, with costs.

Lord *Brougham*.—I entirely agree learned friend in his view of the case both as to the material facts to which to its not being at all in evidence that the agent of *Ferrall*; on the contrary in establishing the supposition of a fact.

As to the view taken of the construction of the 9th George the 2d, it is not necessary to go into that question. I have arrived at a conclusion to which my noble and learned friend has come, and indeed I felt the force of it at the time of the case being before your Lordships. I have ably argued certainly, and very fully; but a strenuous struggle was made upon it, and I think without the least success.

Lord *Campbell*.—The sole question, the most important question in my mind, is, whether, by the construction of a judgment, to the

and that being binding upon the lands, comes in the place of our usual security here by mortgage.

To say that the conusor of the judgment is still liable to the assignee of the judgment, after he has paid to the conusee without notice, is to inflict upon him a most monstrous hardship. There is no saying what injustice the Legislature in its omnipotence may not do, but it would certainly be as arbitrary an act of legislation as I ever heard suggested, if the conusor of a judgment were still to be liable; and it would require very strong language to shew that this was the intention of the Legislature. But when we examine the act of the 9th of George the 2d, which is supposed to have done something so monstrous, I think it has no such enactment, and that on the contrary it saves the rights of the conusor. I am of opinion that the act of the 9th of George the 2d is a very salutary act, because it makes these judgments assignable, and very much facilitates these transactions when money is borrowed upon the security of land; but such an enactment as this was by no means necessary to give effect to an assignment, because, as my noble and learned friend the Lord Chancellor has stated, the assignee of the judgment may protect himself effectually by giving notice to the conusor, and where that is done, any subsequent payment by the conusor to the conusee would not be good as against the assignee. Such an enactment therefore was wholly unnecessary to obtain the object of the Legislature, and I think that there is no language employed by the Legislature which would convey a meaning or bear an inference of that sort, and therefore I am of opinion that this judgment, which proceeds upon that principle, is properly come to, and that it ought to be affirmed.

Judgment affirmed, with costs.

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*Trusts. No-
tice. Trustee's
acts.
Preference.*

Trust-funds were invested in the purchase of tr in a banking company in the name of one of was also a holder of shares in his own ri company, and afterwards made various sale of shares therein. There was no disting which the shares could be traced, the sam nature of capital, expressed by quantity. The to assign some of the shares standing in h banking company, as security for repayment of had been made to him, but no transfer was m wards became bankrupt, without having shar satisfy the trusts, and his agreement to assign :
HELD, 1st, that the banking company had no liei shares which had been held in trust.

2d. That although the shares held in trust m changed by sale and re-purchase, the trustee m sidered as holding, for the purposes of the number of shares out of a larger number that w his name at the time of his bankruptcy.

3d. That as no shares were transferred in pu agreement, no question as to whether the

sixth years of Geo. IV.; with a capital of 2,000,000*l.* in 20,000 shares of 100*l.* each, of which 25*l.* only were paid up. The shares were not distinguishable by any marks, but were in the nature of capital expressed by quantity only. The capital was increased, in 1836, by 20,000 additional shares of 10*l.* each, resembling the original shares in all respects except the amount. *John Wright*, who carried on the business of a banker, in partnership with *Henry Robinson* and others, under the firm of *Wright and Co.*, was an original proprietor and director in the Provincial Bank of *Ireland*, and continued to be so until his bankruptcy in 1840.

By a deed of settlement, dated the 3d of *April*, 1828, *Francis Johnson* vested certain *French* stocks in *John Wright* and *Henry Robinson*, upon trusts, under which the said *Edward Pinkett*, and others of the respondents, became beneficially interested. The *French* stocks were sold by *Wright* and *Robinson*, at *Johnson's* request, in *March* 1830, and in the month of *April* following the produce was applied in the purchase of 21,000*l.* *English* consols, which were transferred to *Wright* and *Robinson*. They, in *May* 1830, at the instance of *Johnson*, sold out 5,000*l.* consols, part of the 21,000*l.*, and *Johnson*, who was himself a broker, with the proceeds of the sale, and 82*l.* 5*s.* added by himself, purchased 160 shares of 100*l.* each, in the capital of the Provincial Bank of *Ireland*, in the name of *John Wright* alone, the bank rules requiring that shares should stand in the name of one person only. The certificates of the shares were delivered to *Wright* with this indorsement on one of them:—"160 *Irish* Provincial Bank shares certificates—Name of *John Wright*, Esq., in trust for *F. Johnson*." These certificates were afterwards deposited with, and remained in the possession of one of the *cestuis que trust*. In *July* 1830, *Johnson*, *Wright*, and *Robinson* executed a deed poll, indorsed on the settlement of *April* 1828, declaring that *Wright*

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Caroline and Louis, and a Mr. *Wright* as personal representatives. *Caroline* after respondent, *Edward Pinkett*, and *Lois Plumley*. These and their children interested under the trusts of the s 1828, and the dividends on the shares use by *Wright* from the time of *Johnso* of his own bankruptcy.

From the time when the 160 shares of *Bank of Ireland* were purchased, down the number of original shares standing from time to time, varied from 750 change appeared to have been made in after 1837. On the creation of the s 1836, one of these was allotted as a bonus of five original shares, so that *Wright* 160 shares declared to be held by him likewise entitled to 32 of the additional appeared that 55 additional shares were s in 1840.

In *February* 1840, *Wright*, being in vential Bank of *Ireland*, wrote a letter follows :—

“SIRS—As collateral security for from the Provincial Bank of *Ireland*

the shares of 100*l.* each, of the stock of the Provincial Bank of *Ireland*, now standing in my name.

“JOHN WRIGHT.”

In *November* 1840, after *Wright* and *Co.* had stopped payment, the solicitor of *Edward Pinkett* gave the Provincial Bank notice, that the parties interested under the settlement of *April* 1828, claimed 160 original and 32 additional shares, and that the same were held by *Wright* in trust. The solicitors for the bank replied, that part of the shares held by *Wright* were pledged to the bank as a security for money they had advanced to him, and the remainder the directors considered themselves entitled to retain, to cover the balance due to them from *Wright* and *Co.*, who were their bankers in *London*, adding that the directors had no previous intimation of any claim on *Wright's* shares, except by themselves, or that any part of them were held in trust by him. In *December* 1840, *Wright, Robinson*, and their copartners, were declared bankrupts.

In *January* 1841, a notice, on behalf of *Walter Blount*, was served on the Provincial Bank, claiming twenty shares of 100*l.* each, and four shares of 10*l.* each, of those standing in *Wright's* name in the Bank register. The grounds of this claim were, that, in 1825, *Wright* and *Co.*, being *Blount's* bankers, purchased the said twenty shares with his money, by his directions, and thereby became a trustee thereof for him, and afterwards regularly gave him credit for the dividends on such shares in his banking accounts.

The assignees of *Wright* and *Co.*, under their bankruptcy, claimed all the shares that stood in *Wright's* name at the time of his bankruptcy, as being in his power and disposition within the bankrupt laws, and part of his estate, distributable among his general creditors.

In *January* 1841, a bill was filed by *Edward Pinkett*, and other parties interested under the settlement of 1828, against *Wright* and *Robinson*, as trustees thereof,

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might be transferred to them (subject contained in the deed under which was constituted), and that the said shares, might be sold, and if the proceeds sufficient to purchase 5000*l.* consols *Robinson* might be charged with the cost.

John Wright, in the answer put in, stated that none of the shares at the time of his bankruptcy belonged to him. He was trustee of them for the different assignees under the bankruptcy, the assignees representing the Provincial Bank of Ireland. He set forth their respective answers, set forth to effect before stated (b).

The cause came to be heard before Sir *J. Wigram* in November and December 1841, when his Honour made a decree whereby he directed that 160 original shares of 100*l.* each, and 320 of 10*l.* each, in the Provincial Bank of Ireland, the shares standing in the name of *A* of the said Bank at the time of his bankruptcy, should be sold by him on the trusts of the settlements mentioned in the pleadings mentioned. But that decree was without prejudice to the claim of

original and four additional shares, further parts of such shares, standing in *Wright's* name in the books of said Bank at the time of his bankruptcy; and without prejudice to any claim which the said Bank and the assignees of *Wright* might have on the shares standing in his name at the time of his bankruptcy, by reason of any interest *Robert John Bunyon* formerly had in forty-five of the original shares standing in *Wright's* name in the Bank books at the time of his bankruptcy, or by reason of 125 original shares alleged to have been transferred by *Wright* to *John Petty Muspratt* in August 1836; and for the purpose of enabling the Court to decide on such claims, it was referred to the Master to make various inquiries specified in the decree (d).

The Master by his report, dated the 6th of July, 1843, found that 225 original shares, of 100*l.* each, in the Provincial Bank of *Ireland*, and 55 additional shares, of 10*l.* each, were standing in the Bank books in the name of *John Wright* at the time of his bankruptcy, and that there was then due, for dividends on said shares, the sum of 1482*l.*

And he found that for many years previous to 1825, and thenceforth down to the time of *Wright's* bankruptcy, *Walter Blount* kept a banking account with *Wright* and *Co.*, and *Wright*, by his direction in 1825, purchased for him twenty original shares in the said Bank, which shares *Wright* caused to be entered in his own name in the Bank books, without the knowledge of *Blount*; and the purchase money and subsequent calls were paid by *Wright* out of *Blount's* monies in the hands of *Wright* and partners; that in 1836, four additional shares were allotted to *Wright* in respect of the twenty original shares, and that these twenty and four additional shares formed part of the 225 original and fifty-five additional shares standing in *Wright's* name in the books of said Bank at the time

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(d) 2 Hare, p. 138.

and set to advance him 5,000l., to wit:
a deposit of the said scrip receipts ar
registered in *Wright's* name in the Ban
for the 5,000l., and for any balance t
from *Bunyon*. And he found that t
was carried into effect, and that in 1
shares of 10l. each were allotted to *W*
the said 95 shares; that 50 of the 95 s
quently sold by *Wright*, and that since
account was settled between *Bunyon* an
Wright and *Co.*, whereby the assignees g
for the whole value of the said 95 an
the dividends thereon, down to *Midsu*
that *Bunyon* agreed to release and as
his interest in the said shares.

The Master further found, that the n
shares standing in *Wright's* name were
the time of his bankruptcy, less than 2
of the transfer of 125 shares to *John*
which he found to have been made in 18
tion of a loan of 5,000l. made to *Wright* i
the Provincial Bank, which loan was rep
February 1837, and then the said 125 sha
ferred to *Wright*, and he found that th
shares that had been before transferred
that the dividends which accrued due

on the twenty original and four additional shares, and paid *Bunyon* the dividends on the said 45 original and 19 additional shares down to the time of his (*Wright's*) bankruptcy. The Master appointed *Reynolds*, before mentioned, and another person, to be trustees of the said settlement, in place of *Wright* and *Robinson*.

The report was not excepted to, and it was confirmed absolutely by an order of Court.

The cause having come on for hearing for further directions, the Vice Chancellor (Sir *J. Wigram*,) made a final decree, dated the 7th of *November*, 1843, and thereby ordered that *Wright* and the Provincial Bank of *Ireland* should transfer 160 of the 225 shares of 100*l.* each, and 32 of the 55 shares of 10*l.* each, standing in *Wright's* name in the books of the said Bank at the time of his bankruptcy, and that the Bank should pay the dividends due thereon to the said *Reynolds* and his co-trustee, to be applied on the trusts of the said settlement, and should transfer 20 of such original and 4 of such additional shares to *Blount*, and pay him the dividends due thereon, and the remaining 45 original and 19 additional shares, with the dividends thereon, to the official assignee under the bankruptcy of *Wright* and *Co.*

The Provincial Bank of *Ireland*, by the public officer, appealed against both the decrees.

Mr. *J. Russell* and Mr. *J. Parker* (with whom were Mr. *Elmsley* and Mr. *V. Neale*) for the appellant :

John Wright was a partner in the Provincial Bank of *Ireland*, from its commencement in 1825 to the time of his bankruptcy in 1840 ; and being at the latter period indebted to the Bank in a very large sum, all the shares therein standing in his name were *primâ facie* liable to satisfy the partnership debt ; *Fereday v. Wightwick* (a). But independently of his liability as a partner, the Bank had

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and legal possession of all the pro-
shareholder could claim any benefic-
notice or knowledge, directly or indi-
affecting the shares standing in *Wright*,
any other person claimed any inter-
letter was a complete equitable assign-
shares out of all the shares standing.
The Bank directors had a right to select
his shares. They could not have an
secret trusts, and no such trust could
defeat *bona fide* transactions with third
Watkins (f). *Johnson*, the author of the
confidence in *Wright* personally. I
placed no such confidence in him, but
sion of the property: so, between the
maxim, *potior est conditio possidentis*,
in addition to the other maxim, that
ownership of his property to appear to
son, under a secret trust, has no right
him who deals *bona fide* with the ostensible

The case of the appellants is in effect that
they purchased 100 shares standing
and of these they are the equitable owners
on behalf of the respondents, that *Wright*
breach of trust in assigning those shares

Yes; without any notice of the trust. Suppose this case related to property vested in the public funds, would it not, to all appearance, be the property of the individual in whom it stood vested? Suppose the case of two competing equitable assignees, he who has first given notice to the holder of the fund, although his assignment is posterior in date, acquires a preferable title to the possession of the fund, *Dearle v. Hall*, and *Loveridge v. Cooper* (g). The principle established in these cases was followed in *Foster v. Blackstone* (h), and affirmed on appeal in that case (i) by the House of Lords.

[Lord *Cottenham*, after stating the principle of the case of *Dearle v. Hall*, asked if there was any case in which the dealing of a trustee was held to affect the right of the *cestui que trust*.]

There is no case expressly on that point. Why should not they be held bound to have given notice of the trust to the bank directors? Neglecting to give such notice, they have no right to complain that the directors dealt with the ostensible owner as they did with all other owners of shares. Had *Wright* contracted to pledge the shares to a stranger, and the stranger applied to the bank, as would be his duty, he would be informed that they were already pledged. But to whom would the bank apply for information? By their books *Wright* appeared to be the owner; they knew of no other owner; and they were themselves in possession of the shares. There was no proof that any of the shares standing in *Wright's* name, at the time of his bankruptcy, were the shares purchased with the trust funds. It was found by the Master, and not disputed, that ninety at least of the original shares, and a proportional part of the additional shares, were not any of those purchased with the trust funds.

(g) 3 Russ. 1, see p. 20, *et seq.*

(h) 1 Myl. & K. 297.

(i) *Foster v. Cockerell*,

3 Clark & Finn. 456.

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THE DECREE WAS WRONG ALSO IN GIVING
Blount and *Bunyon*, or of the parties
latter, to sixty-five original and two
shares. These were co-defendants in
issue could be raised between them
adjudication. But suppose that, in
there was no objection to the decree
proof that any shares were purchased
money, or that any of the shares now
name, were shares obtained in exchange
receipts. *Blount* may have a claim
estate for the misapplication of his
right to claim twenty of these shares.

The final decree, instead of ordering
pay the costs of the suit, ought to have
be paid by the several parties claiming
trusts, and by *Wright*, as it was by
former in not giving notice of the trust
conduct of the latter, that the suit was

Mr. *Bethell*, for the respondents
trust settlement (of 1828), and for the
and *Co.* (*k*).

The Provincial Bank is not an ordinary
nor is it a corporation with corporate
formed under an act of Parliament.

in law are strangers to each other. The shares are capable of being transferred and held in trust, which cannot be done in an ordinary partnership (*l*). No legal right to any shares was vested in the Bank directors by *Wright's* letter of *February* 1840, which was not followed by any transfer of shares from *Wright*; it could not create any charge or lien on the shares held by him as trustee, even though the bank might not be held to be affected with notice of the trust. But *Wright* being a partner and director of the Bank at the date of that letter, the bank must be considered as affected in equity through him with notice of the trust. *Wright*, by the declaration of trust in 1830, made an equitable assignment to the first respondents of 160 of the shares then standing in his name. Suppose the letter of 1840 constituted an equitable assignment of shares, then, of the two assignments, that which was prior in date must be preferred. The bank shares are not in the nature of a debt from the bank, nor is the bank a trustee for the shareholders. All arguments founded on the nature of ordinary partnerships, or on the necessity of notice to the bank for the purpose of perfecting an assignment of shares, are misapplied. The bank is not bound to recognise such notice. The principle of the cases of *Dearle v. Hall*, and *Loveridge v. Cooper*, on the doctrine of notice, which arose in bankruptcy, is explained in the report (*m*), and is not applicable to this case. If personal property be vested in trust, notice of the dealings of the beneficiary of the property must be given by the party dealing with him to the trustee. That does not apply to real estate, *Jones v. Jones* (*n*); *Cooté on Mortgages* (*o*). In the present case, *Wright*, the trustee, was the person to whom notice should be given of the dealings of the owners with the shares standing in his name. But the trustee

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(*l*) See 2 Hare, 13, 23-4.

(*n*) 8 Sim. 633.

(*m*) 3 Russ. 22-3, and 58.

(*o*) P. 693.

that decree directing those inquiries, as itself, nor the Master's report in pu objected to, until the final decree was pro the observations of Lord *Cottenham* in *L v. Trye*, 7 Clark & Fin. pp. 455-6). V objection to the adjudication betwe this was a case coming within the scop observations in this House, in *Latou sany* (p). "Where," said his Lordshi out between defendants by evidence aris and proofs between plaintiffs and defe equity is entitled to make a decree betw —is bound to do so. The defendant right to insist that he shall not be li: defendant in another suit in the same then be decided between him and h There were 225 shares standing in W of these were adjudged to belong to the were so many claims to the remaining parties might say, "You are not to to many claims, the subject of so many disposed of in one suit." The parties l for a complete adjudication.

The assignees of *Wright and Co.* : forty-five shares, and nineteen additiona

been decreed to the other parties. These were the absolute property of *Bunyon* at the time of *Wright's* bankruptcy, subject to a mortgage to *Wright* and *Co.*, and his interest had been, as stated in the Master's report, released to the assignees of *Wright* and *Co.* Whether *Wright* was trustee, or agent, or mortgagee, in respect of those shares, his agreement to pledge shares to the Provincial Bank could not pass any interest to that bank, in shares which belonged to *Bunyon*. That agreement could not amount to an actual transfer of the legal interest in any shares, and could only operate in equity to the extent of affecting such beneficial ownership as *Wright* might have. And it is clear from the facts of the transaction, as found by the Master, that *Wright* had no beneficial interest in those shares that he could lawfully dispose of. These shares, however, were in the order and disposition of *Wright* at the time of his bankruptcy, within the bankruptcy laws; *Ex parte Lancaster Canal Company* (r); *Nelson v. The London Assurance Company* (s); *Ex parte Watkins* (t).

It is submitted that both decrees are unimpeachable in all respects, and ought to be affirmed.

Mr. *Purvis*, with whom was Mr. *F. Riddell*, for the respondent *Blount*:

It was found by the Master's report, not excepted to, that *Wright* in 1825 purchased twenty original shares in the Provincial Bank—and which were standing in his name at the time of his bankruptcy—with the monies and by the direction of *Walter Blount*, and thereupon became a trustee of such shares for *Blount*, and accounted with him for the dividends which he received on the said shares, from the time of the purchase up to a short time previous to his bankruptcy. The letter or contract by

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(r) 1 Deac. & Chit. 111.

(t) 2 Mont. & Ayr. 248.

(s) 2 Sim. & Stu. 292.

benefit of his priority of title.

It was part of the case made in argument by the appellants, that the Provincial Bank was a partnership, and had a common partnership share standing in *Wright's* name. It was not an ordinary partnership, and the appellants urged on that basis fail. In *West v. Hardwicke* says, "partners themselves are tenants in the stock and all effects; not equal stock in being at the time of entering into the partnership, but to continue so throughout, whatever may be made in the course of trade, and being *et per tout*, each partner must bear all a judgment creditor of the other can co-share." Then he lays down the common law on the three heads of bankruptcy, death, and dissolution of the partnership. This constituted partnership.

The circumstances of this case require to be adjudicated between co-defendants, because necessary to decree the 20 original and 4 additional shares to *Blount*, either before or at the time of the transfer of 160 original and 32 additional shares to *Reynolds* as a trustee for the plaintiffs and other persons having an interest therein, *Blount* being the first claimant in said

(On the objection to the decree as deciding between co-defendants, he cited *Trevelyan v. White* (t), and *Farquharson v. Seton* (u), repeating from the latter the observations of Lord Eldon, as before cited from *Latouche v. Lord Dunsany*.)

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Mr. J. Russell replied.

Lord Brougham.—My Lords, this is a case of very considerable importance in point of amount to the parties, but certainly not one of any difficulty in the argument. Mr. Wright, a well known banker, and who became a bankrupt towards the latter end of the year 1840, had, while he was a banker and solvent, as trustee under a settlement, joined with others in the purchase of 160 shares of a trading concern, called the Provincial Bank of Ireland. This purchase was made by the trustees at the instance of one of the *cestuis que trust*; they sold out 5000*l.* stock, which was part of the trust funds; and with the proceeds of the sale, and other monies which were added by one of the *cestuis que trust*, Johnston, or one acting for the other *cestuis que trust*, they purchased the 160 shares of 100*l.* each. There could be no doubt whatever that the purchase was made by Wright as trustee; it was equally clear that, having so purchased, he held the shares as trustee, even if nothing further had been done in the matter than what I have now stated. But to make it still clearer, if possible, the certificates of the shares were, indorsed with the words “160 Irish Provincial Bank share certificates, name,”—that is, in the name of “John Wright, Esq., in trust for F. Johnson. June 8th, 1840.” The certificates were deposited with and remained in the possession of one of the *cestuis que trust*,

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(t) 1 Beav. 58b.

(u) 5 Russ. 45.

he was beneficially interested, that agreement may be argued, and has been argued, and has indeed been decided, to raise an equity in favour of the bank in security of their loan to him of 4000*l.*, as against the assignees under his bankruptcy.

Now, I may dispose first of that last matter which I have mentioned, because it is taken out of the cause altogether. The learned Vice Chancellor in giving his judgment says, that the opinion which he expressed with respect to these 160 shares, and 32 additional accruing shares, he gives on the ground that that being trust property is not liable so and so, saving, he says, any question that may be raised on the ground of those shares by the assignees in respect of their contending possibly that they were in the order and disposition of the bankrupt; says he, "If that question is to be raised I must hear it argued, which I have not hitherto done."

I have enquired at the bar, and I find that that question never could arise here; for the assignees have acquiesced in the judgment which was given against them, and accordingly we had not that argument maintained at the bar here. But it is also satisfactory to know—as clearing up any doubt that might remain upon that part of the judgment of the learned Judge below—that it was argued before the Vice Chancellor, and he disposed of the question after the *decree* to which reference is made in the report from which I have read that passage; he disposed of that question after having heard it argued, and disposed of it against the assignees, and undoubtedly the assignees acquiesced in that decision, and so acquiescing did not raise the point at all before your Lordships.

My Lords, there came to be a question with respect to a gentleman, Mr. *Blount*, who claimed twenty shares, alleging that *Wright and Company*, being his bankers, purchased them with money in their hands belonging to

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him, and consequently he claimed those twenty shares as *cestui que trust of Wright*, as against the assignee and the Provincial Bank also. The decree of the Vice-Chancellor has directed an enquiry in respect of the shares, the result of which, if it be found, as Mr. Blosse has alleged, that they were purchased with his money would of course entitle him to recover according to the tenor of the other parts of the decree; supposing that to be well founded, which I think it is, defeating the claim on the one hand of the assignees representing *Wright* and on the other hand of the Provincial Bank of *Ireland* between whom and the *cestuis que trust of John Wright* the main contention in this case has arisen.

Now with respect to the ground of the contention on the part of the Provincial Bank of *Ireland*, I hope I may be permitted, with all due courtesy towards those parties, to express my great wonder that that should ever have been held to be an arguable point. Here is a trustee purchasing as such, without any doubt, holding as such acknowledged as such. Then to say, in the first place that they can pass by the assignment to the assignee under the *fiat* is monstrous. But that is given up; they were not in the order and disposition of the bankrupt, or any thing of the kind. Then what claim has the Provincial Bank of *Ireland*? Now here I ask to keep entirely out of view the whole of the argument resting upon notice. It is said, that *Wright* being a shareholder in the bank, had notice—of course he had notice as trustee acting as such—and that through him the bank had notice. Now I lay that entirely out of view. It is a perfectly debateable point on either side. I do not deny that something may be said in support of the point of constructive notice, and a good deal more, perhaps, in my opinion against it; but at all events it is wholly unnecessary, it is totally superfluous. I do not say it is beside the question; for if the case laboured in other

points it might keep it; but I do not see the necessity of it to support this judgment of the learned Vice Chancellor at all; because the case stands perfectly clear without saying one word of notice, either actual, or implied and constructive. What is the ground of that extraordinary contention of these parties? In the first place, we were desired to look into the various parts of the deed of settlement of the Provincial Bank under which they act, and we did look into them, and a minute examination of them tended, at every step we took, to defeat the claim of the bank. But what is the sum and substance of their contention? It was, that they had a general lien over Mr. *Wright's* shares, and that general lien arose from his being a partner, and that he being such partner as aforesaid, was indebted to them, or would be found to be indebted to them upon the winding up and balancing of the accounts, and that being so indebted to the Bank, they had such a lien as gave them a right to retain his shares. But even that is not sufficient; for, at the very outside, that argument and that statement of the case could only extend to the right to retain, by virtue of their lien, the shares belonging to *John Wright* beneficially. But did that lien give them a right to retain shares which were not his, *John Wright's*, but *F. Johnson's* shares, and which had been deposited with a memorandum of trust indorsed, and upon which shares *John Wright* had executed a declaration of trust, divesting him of all beneficial interest, and confessing that he held them as trustee for the benefit of another? What is said about the lien that partners have in a concern, must be taken with very great allowance even in the ordinary case of a beneficial interest, and supposing he had not been a trustee; because in the case of a partnership there must be a winding up and a dissolution before you can tell what one partner owes to another. In this case of a joint stock bank, the very object of the concern is to enable a person to cut out

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not leave a doubt in any man's mind, never extend by possibility to give the which were not *John Wright's* shares not the partner's shares, supposing it a common partnership, but which were the *que trust*, who alone were beneficially out, therefore, going further into this case, your Lordships to affirm the judgment, how very clear we held this to be, from the course of the argument.

I will therefore simply content myself that the judgment of the learned V. affirmed, and also, undoubtedly, with a

The Lord Chancellor.—If the group appellant has endeavoured to support countenanced by this House, it appears would be a greater inroad made thereby property held in trust than by any case ever been come to in any court of justice the case? Of the fact of these shares there is no doubt; the only doubt suggested has been that, although it is shares were originally the property of those were sold and changed, and of

I have sold it, and bought with the money 10,000*l.* other stock, and I am not liable to you as a trustee." He may have changed it from time to time, but as he is found, at the time of his bankruptcy, to be in possession of certain shares which he was bound to have as trustee for this family, of those shares, beyond all doubt, he must be considered, as against every person, as a trustee.

Then what is the claim of the bank? The bank say, "You are a shareholder in this concern in respect of these shares, but we have advanced you money, not as a shareholder, not as a partner, but as a person borrowing money of the bank; and because you owe us money, we insist upon retaining these shares standing in your name, to repay the balance which is due from you to the bank." Whether that might or might not prevail if these shares belonged to him individually is another matter; but is that to prevail on the assumed fact, which is now established, that he had not these shares beneficially, but that he was a trustee of them for others? The doctrine would be this, that if property be vested in a person in trust, if that property in any way comes under the controul of persons to whom he is indebted, those persons can pay the trustee's debt out of the trust money!

The next proposition is—and which was thought so extravagant that it was not mentioned in the argument, though it stands in the printed case as one of the grounds brought forward for the consideration of the House, and one of the grounds argued below—the next proposition is one that is equally extravagant. They say you have in terms pledged these shares. Now if this property had been property in which the trustee had the legal estate, and the trustee had, in breach of trust, transferred the legal estate to other persons, the question then would have arisen as to whether they were or were not purchasers without notice. But no such case occurs here. The shares never have been transferred at all; they

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securing the debt which I owe to you two equities, that is to say, here is a party which he held for the benefit of endeavouring to create an equity up secure his own debt. Which of those prevail? Undoubtedly the former.

That is the whole case which has the argument below, and of the appeal

Lord *Campbell*.—I entirely considered judgment of the learned Vice case; and I do think that the parties satisfied with it.

The decree was affirmed, with costs

JOSE ALEXANDRO FERREIRA BRANDAO - *Plaintiff.*

GEORGE HENRY BARNETT and others - *Defendants.*

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Feb. 25;
March 3, 9,
10;
Aug. 28.
Banker.
Exchequer
Bills.
Lien.

THE general lien of bankers is part of the law merchant, and is to be judicially noticed, like the negotiability of bills of exchange.

A banker's lien does not arise on securities deposited with him for a special purpose, as where exchequer bills are placed in his hands to get interest on them, and to get them exchanged for new bills. Such a special purpose is inconsistent with the existence of a general lien.

Where a person who is in reality the agent of another, deposits exchequer bills with his own bankers, without informing them whose property these bills are, the bankers may be held entitled to consider these bills as the depositor's property, and to hold them as security for any money due to them from him, if the mode of deposit, or the circumstances attending it, give them a lien on the bills as against him.

A. was the London agent of B., a Portuguese merchant, and in that character purchased exchequer bills for him, received interest on them, and at proper intervals got them exchanged for others. He acted in the same manner for several other foreign customers. A. kept an account with C., as his banker, and at C.'s banking-house had several tin boxes, in which he deposited these exchequer bills, and of which he kept the keys. On the 1st *December*, 1836, A. took out of a tin box several exchequer bills, which he delivered to C., requesting C. to get the interest due on them, and to get the exchequer bills exchanged for others. C. did so. Before A. came to take back the exchequer bills, acceptances of his beyond the amount of his cash-credit account, were presented at C.'s bank, and paid.

A. afterwards became bankrupt :

Held that C. had not a lien on the exchequer bills in his hands for the balance due to him on A.'s account.

THIS was a writ of error brought upon a judgment of the Court of Exchequer Chamber, reversing, upon writ of

ons ; and, truly, a special plea, in which
bankers, set up a claim, by way of
exchequer bills to secure the balance
a firm called *James Burn and Co.*

The exchequer bills sought to be rec-
one in number, and amounted to th
The balance of *James Burn and Co.*,
the lien was claimed, amounted to 321

The plaintiff was a *Portuguese* me
the year 1834, resided at *Rio de Janeiro*
returned to *Portugal*, where he has sin

The defendants are bankers in *London*

Edward Burn, who for many years
as a merchant in *London*, and traded
James Burn and Co., kept an ordinary b
them, drawing cheques upon them, and
able at their bank : and such cheques
by the defendants out of the funds held
account, which was always in cash to

Burn was the agent and corresponde
who from time to time remitted bill
money to *Burn*, and employed him u
invest the proceeds in exchequer bill
ployed in the same manner by other
dents.

Burn kept at his bankers in general

exchequer bills from the tin box, and delivered them to the defendants, with a request that they would receive the interest and exchange the bills; and after the defendants had so done, *Burn* obtained the new bills from them when he next called at the banking house, which generally happened within a week or fortnight after the receipt of the bills by the defendants; and when he so obtained them, he locked them in the tin box, as before, where they remained till wanted.

Prior to *December* 1836, *Burn* had sold, by express order of the plaintiff, so much of the plaintiff's exchequer bills as reduced the amount to 10,100*l.*, and on 1st *December*, 1836, the remaining exchequer bills of the plaintiff (to that amount) were locked up in the private tin box, as before described. The usual advertisement by the Government for the payment of the interest and exchanging the exchequer bills appeared about that time; and on or about 1st *December*, *Burn* went to the banking-house of the defendants, and took from his private tin box the last mentioned exchequer bills, and delivered them to one of the defendants, saying, "will you have the kindness to get these bills exchanged for me?" The defendants counted the bills, repeated the number to *Burn*, who said, "Right;" and no further conversation passed upon the occasion.

The following is the form of one of the exchequer bills:—

"No. 8551. 1000*l.* By virtue of an act, 6th & 7th *Gulielm IV., Regis*, for raising the sum of 14,007,950*l.*, by exchequer bills, for the service of the year 1836-7, this bill entitles ———, or order, to one thousand pounds, and interest after the rate of twopence halfpenny *per centum per diem*, payable out of the first aids or supplies to be granted in the next session of Parliament, and this bill is to be current and pass in any of the public revenues, aids, taxes, or supplies, or to the account of his Majes-

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had not been filled up, and they were securities, payable to bearer, and trans-

The defendants, on the 20th of *t December*, delivered up the bills so r at the proper office, receiving the inter which they carried, as usual, to the and obtained in exchange the new exc formed the subject of this action. The notice, until the failure of *Burn*, that his property; nor were the names of *I* communicated to the plaintiff.

At the time *Burn* delivered the exc defendants, on 1st *December*, he was unable to come to town on business, time until after his failure in business, the 23d day of *January*, 1837, and he cation with his bankers (the defendants in the interval he had desired his cle the defendants the particulars of th received in exchange for those deliv exchanged; and the defendants furnis paper containing such particulars.

On the morning of the 21st *January*, of *Burn's* account was in his favour 1596*l.* 11*s.* But in the course of that

and made him a debtor to the defendants to the amount of 3211*l.* 19*s.* 7*d.* For this amount the defendants held the plaintiff's exchequer bills, and in consequence of such detention this action was brought.

At the trial of the cause before the Lord Chief Justice *Tindal*, at the sittings after Michaelmas Term, 1837, a verdict was found for the plaintiff, subject to the opinion of the Court of Common Pleas upon a special case, with liberty to either party to turn the case into a special verdict, which was afterwards done.

In Michaelmas Term, 1840, the Court, after taking time to consider, gave judgment in favour of the plaintiff (*a*). This judgment was afterwards reversed in the Exchequer Chamber (*b*).

Sir *T. Wilde* and Mr. *Montagu Smith* for the plaintiff in error.—It is admitted that bankers may, as a general rule, have a lien on property deposited with them by their customer, if at the time of such deposit their customer is actually indebted to them. But that lien can only arise on such property as may come into their hands in the way of their trade as bankers. The first thing, therefore, for the bankers to establish in this case is, that the exchequer bills were put into their hands by the customer in the course of their trade. It cannot be said that that is the case here. The facts of this case show that the exchequer bills were delivered to the bankers, not in the ordinary way of their trade, but only for a special purpose. In such a case no general lien can arise. The thing to be performed by the bankers here, was what a mere porter could have done: it was to carry the exchequer bills to the proper office, to leave them there, and on the proper day to fetch back the new bills which had been given in exchange for the old ones. The mere possession of exchequer bills does not imply that the person possessing them is the owner of

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(*a*) 1 Man. & G. 908; Scott N.R. 96. (*b*) 6 Mann. & Gr. 630.

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them. In this respect they cannot properly be compared to bills of exchange; and the circumstances which exist here, rendered it impossible for the bankers to believe that these exchequer bills were the property of *Burn*, and were intended by him to be deposited with them in the course of their business, and for the purpose of securing the advances made to him. These bills were generally kept in tin boxes, and it is not even pretended that when they remained there they were subject to the bankers' lien. The bankers allowed *Burn* to keep these boxes in their strong room, but they never inquired into the contents of those boxes, nor affected to have any control over them. The mere fact of their being in the bankers' house, conferred no right on the bankers.

As a general rule, it is clear that no two persons can by agreement between themselves, create a lien in favour of one of them against the goods of a third person, *Leach v. Cooper* (c), *Rushforth v. Hadfield* (d), *Oppenhe v. Russell* (e), *Lucas v. Dorrien* (f), lay down that principle in a clear and positive manner.

No doubt, it is stated here, that it is the custom of bankers to receive exchequer bills from their customers, and in the course of their business to receive the interest on the bills, and to get those bills exchanged at the proper time for others; but the case here goes on expressly to say, that these bills were received under the special circumstances which the verdict sets forth. This mode of stating how the bankers became possessed of these bills, takes this particular case out of the general custom; so that, supposing the custom to be what the defendants say, the verdict here shows that that custom does not attach on these bills. One of the clearest pro-

(c) 3 Bing. N. C. 99.

(d) 7 East. 224.

(e) 3 Bos. & Pul. 42.

(f) 7 Taunt. 278; 1

Moo. 29; see also *Hadfield*

Phillips, ante, p. 343.

that there had been no general dealing between the bankers and *Burn*, so as to give them a general lien, as on deposits in the way of their trade, is to be found in an answer made on one occasion by the bankers, when *Burn*, who had previously delivered to the bankers several exchequer bills, on which he asked them to receive interest, and which were also to be exchanged for others, allowed those bills to remain in the bankers' hands for some time, and then asked for some of them. The bankers answered that they would rather that he should take the whole, which he accordingly did, and locked them up. This answer never would have been made, nor would any such transaction have taken place, with respect to property deposited with them as security for their general balances. The whole circumstances show that they knew that these bills were merely kept by *Burn* for himself in the bankers' strong room for his own security. And the special verdict does not contradict but rather confirms the plain inference thus raised; for it does not find any deposit in fact made of these exchequer bills for the purpose of meeting the general balance.

The bills are, beyond all question, the property of the plaintiff. It lies on the bankers to show the facts which have taken out of the plaintiff the right to dispose of this property. They have not shown any such facts, and such facts cannot be implied. Nothing can be intended on a special verdict; everything must be found, and no fact which is not found can be intended. *Withams v. Lewis (g)*, is a very strong authority to this point. In this case not a word is stated in the special verdict to show any express creation of lien by *Burn* in favour of the bankers. In all the cases which have been decided upon liens arising on the custom of a particular place or a particular trade, so as to affect two parties dealing

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(g) 1 Wills. 55. See also *Duncombe v. Wingfield*, Hob. 263.

was held to have a lien on the price of the goods sold by him for his principal to the amount of the sum for which he had so become surety, but there the lien arose upon a special arrangement entered into in writing between the parties. In *Naylor v. Mangles* (*p*), in like manner, the lien of a wharfinger was maintained, but the expressions there used by Lord *Kenyon* show, that circumstances, such as exist in the present case, would not, in his opinion, establish the right to a lien without a special agreement. That was an action by a wharfinger claiming a lien on his general balance. Lord *Kenyon* said, "liens were, by common law, by usage, or by agreement. Liens by common law were given where a party was obliged by law to receive goods, &c., in which case, as the law imposed the burden, it also gave them the power of retaining for his indemnity. A lien from usage was matter of evidence; but in the present case the usage had been proved so often that he should consider it as a settled point that wharfingers had the lien contended for."

In the course of the argument in this very case in the Court below, Mr. Baron *Parke* expressed his opinion as to the necessity of putting this claim of lien on the record. He said (*q*): "where the custom is set out upon the record, the Court can see the extent of it, whether it extends to all negotiable securities, for whatever purpose deposited, or whether it is limited to deposits made with the banker in the course of business." He must of course have changed that opinion when he concurred in this judgment, since the supposed custom, and the circumstances out of which it is said to arise are not here set forth; but it is submitted, with much confidence, that his first impression was the correct one. The special verdict here is defective in two respects, first, because nothing is stated as to what is the general custom of

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(*p*) 1 Esp. N. P. Rep. 109. (*q*) 6 Man. & Gr. 660.

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merchants as to lien, and, secondly, because what is not claimed exceeds anything that has been usual. On both these grounds the judgment of the Court below is defective. [Lord Campbell.—If a general lien is once established, it surely then becomes matter of law : whether it exists or not may be matter of fact, but when it exists the extent of it must be matter of law.] That is not so in the first instance ; for the circumstances from which it arises and the extent to which in any particular place or trade the lien exists must first be ascertained by evidence. But assuming that bankers have a general lien, and that that is such settled matter of law as not to require to be stated in the special verdict, then it is submitted that the facts here shown on the record do not bring this case within the general rule. The leaving of these exchequer bills in the hands of the bankers was like leaving plate with the owner. The property continued in the owner. The general right of the plaintiff is clear ; the defendants must, by fact, take themselves out of the operation of that clear right. No such facts are shown here. The deposit of the bill was like the deposit of plate, an act done for a special purpose, but not falling within the description of an act done in the ordinary course of their business as bankers.

The *Solicitor-General* (Sir F. Kelly) and Mr. Martineau for the defendants in error. It is perfectly clear that with respect to the general lien of certain classes of persons, bankers, a wharfinger and a factor, the right to lien is not a matter of law. The general right of lien of a factor, and the right of stoppage *in transitu* are instances of this sort. The latter right is of extremely modern origin ; yet it is stated by Lord Tenterden, in his book upon shipping (r), to be a matter of law. No judge would require it to be pleaded, nor any one allow it to be proved. Even so long

(r) Ch. xi., Shee's ed. 511.

ago as Lord *Kenyon's* time, his lordship, in *Naylor v. Mangles (s)*, held the wharfinger's right to lien to be too well established to require to be proved in evidence. It seems that the lien of a banker does not attach on a deposit of plate: that is a matter which need not now be discussed; but it does attach on a deposit of bills of exchange. The real question for this House to decide is, whether the present case falls within the rule applicable to the first or to the second of these instances. The law as to the banker's lien is so well established that every man who at any time makes a deposit with a banker knows that he does so on the settled though tacit understanding that should the balance of accounts be afterwards against him, the customer, the lien of the banker will attach on all securities of his at that time in his banker's hands. If this was not so, the supposed right of the banker, though well known and admitted, would in truth be valueless. No doubt the general right of the banker might be waived by a special contract, but that contract must be very plain and express, and must be distinctly shown. No such contract has been shown here. The argument on the other side, that the banker must show how his right to lien arises, is completely erroneous. The burden is on the other side; the right is a general right; it is for the other party to show that his is a case of exception.

If exchequer bills are placed in the hands of bankers to do the particular business with respect to them, which it is the business of a banker to perform, the lien at once attaches. A case of this kind marks, in the plainest manner, the distinction between the cases of the deposit of plate with a banker and the deposit with him of bills of exchange, with a direction to him to get in the money as it becomes due on those bills. In the latter case there is no

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(s) 1 Esp. N. P. Rep. 109.

general right to lien would arise : in the other it would be excluded by the particular terms of the contract. In the present case the transaction was one so completely in the ordinary business of bankers, and so free from the influence of any particular contract, that the lien arose as of course, and for the plaintiff to make out an exemption from its operation it is necessary for him to show that the deposit was made upon a contract, that though the balance should be against the customer, the lien of the banker should not attach. [Lord *Campbell*.—But was it not a part of the contract that the new bills were to be restored?] In all cases whatever, where property is entrusted by one man to another, it is on an implied contract that it is to be returned on request, and so far as that implied contract is concerned, there is not a shadow of distinction between property put into the hands of a person in the ordinary course of his business and for a special purpose. [Lord *Campbell*.—You may argue that there is no distinction in law, but there is plainly a distinction in fact. Lord *Brougham*.—Thus : if I put money into the hands of my banker, he is my debtor to the amount of the money ; but that is not so with respect to a bill of exchange put into a box in his house.] If a bill of exchange and an exchequer bill were put into the hands of a banker on the same day, he would be bound to deal with both as the property of the person depositing them, and to restore both on demand. [The Lord Chancellor (Lord *Lyndhurst*)—It seems to have been thought in the Court of Common Pleas that no representation was here made that the customer had a right to deal with them as his property.] The absence of any distinct representation of that sort will not affect the case, if the deposit of the bills can be treated as a deposit for the purpose of their being used by the bankers in their character of bankers. The purpose for which the deposit was made here established that fact. It is supposed, on the other side, that these particular securities were deli-

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vered to the bankers under an implied promise that they should be delivered back whenever the customer might think proper to ask for them. To a certain extent that is true. But that will not prevent the lien from attaching, if all deposits of property are impliedly subject to that condition. [*The Lord Chancellor*.—The proposition to support your argument should be qualified thus: shall be returned when demanded, provided that the balance shall not be drawn against the depositor. *Lord Campbell*.—That would apply to all negotiable securities deposited with a banker. I say that there is no distinction between the deposit of an exchequer bill and other negotiable security to be locked up, and negotiable securities which remain with the banker.] The qualification “to be locked up,” is not to be introduced here; that would be a matter of specification. The act, which takes place after the return of the customer, must not be mixed up with the return itself.

The contract with the bankers is, that they will receive the bills, and take care of them. The moment it is shown that exchequer bills pass by delivery, and that it is the custom of bankers, in the course of their business as such to change them, the right to lien for a general balance is established. In *Davis v. Bowsher* (v) the banker selected some bills for the purpose of making advances on them, and refused others; yet he claimed to keep those which he had refused till he knew whether those on which he had made advances would be paid. There *Lord Kenyon* said, that, in his opinion, a general lien existed, unless special circumstances showed that there was no lien; *Jourdain v. Lefevre* (w), and *Bosquet v. Dudman* (x), are to the same effect. And in *Boland v. Bygrave*, the circumstances appearing to raise the doubt whether the bill was deposited for discount

(v) 5 Term Rep. 488.

(x) 1 Stark. 1.

(w) 1 Esp. 65.

safe custody, Lord *Tenterden* said (y), " If the right of the plaintiffs to recover depended on the question, whether authority was given on the part of the customer to the bankrupts (the bankers) to discount this bill, I should think, as the case now stands, that I ought to direct the jury to find, as a question of fact, whether this bill was delivered at the bank to be discounted, or to be kept for safe custody. But I am opinion that the right of the plaintiffs (the assignees of the bankers) to recover, rests on other and independent grounds ;" and his Lordship then added the expression of opinion already quoted. The general lien of the banker, and the right it confers, were strongly marked in the case of *Collins v. Martin* (z), where it was held, that, if A. should deposit bills indorsed in blank with B., his banker, to be received when due, and the latter should raise money on them by pledging them with C., another banker, and should afterwards become bankrupt, A. could not maintain trover against C. for the bills. That case is an answer to the argument on the other side, that no two persons can, by agreement between them, affect the rights of a third. That proposition was too broadly put ; and the case just cited shows that, under certain circumstances, an agreement of that kind will be held effectual. And *Wookey v. Pole* (a) is an authority to show that there is no distinction between a bill of exchange and an exchequer bill in respect of the lien of a banker. There the bill was deposited by the owner with his stockbrokers for the purpose of being sold ; they, instead of selling it, deposited it at their bankers for advances, and afterwards became bankrupts ; and it was held that the owner could not recover in trover the bill from the bankers, for that an exchequer bill, like bank

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(y) 1 Ry. & Moo. 272.

(a) 4 Barn. & Ald. 1.

(z) 1 Bos. & P. 648.

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notes and bills of exchange, indorsed in blank, passed delivery. [*The Lord Chancellor.*—In that case there was an express pledge.] That is so; but the case shows, being decided on the ground of such instruments passing by delivery, that though the circumstances may not be the same, the principle is.

[*The Lord Chancellor.*—The question here seems to be whether, for all purposes, a party, who is in possession of a negotiable instrument, is to be considered as the owner of it. He may pledge it, provided that all is done *bonâ fide* in making the pledge: but are the circumstances here such as to be equivalent to an express pledge?] They must be so considered in virtue of the ordinary business of a banker, and his established right of lien over securities deposited in his hand in the way of his business. [*The Lord Chancellor.* Suppose a man goes to a banker with 1000*l.* in bank notes and says, I want to send this money into the country, will you get these notes changed for a bank post bill, and the banker says that he will; but when the man goes again to get the bank post bill, the banker says, I shall retain these notes, or this bill, until you pay the balance which I now discover to be against you.] That is either a *casus idem per idem* with the present, or the answer to it: that what the banker undertakes to do is not in the ordinary way of his business. [The Lords intimated that it was in the ordinary way of the banker's business.] That it is a matter of particular contract. [Lord Brougham. In the case supposed, the banker ought to say, I take the notes subject to my right of lien; otherwise, he waives it.] But here the banker had not merely to change the bills, but to receive money on them, and he placed the money to the credit of the customer. That was completely in the ordinary way of his business, and no special contract intervened to affect the transaction. It is admitted that a special contract may affect the general right. The

case of *Vanderzee v. Willis* (b) is an instance of that sort ; but that shows that where the special contract does not intervene, the general right applies. Besides which, the answer to that case, as well as to *Lucas v. Dorrien* (c), is, that they are not cases of negotiable securities, but that in them the right of lien could only arise upon express contract. Here the instruments were negotiable securities, passing by delivery. The bankers had a right to deal with these bills as if they were the property of *Burn*. Suppose the accounts had been equal, but just as the bankers returned from the Exchequer Bill Office with 2000*l.* interest, a cheque of their customer for 1500*l.* had been presented, there can be no doubt that the bankers would have been justified in paying that cheque out of the money thus in their hands. This is in fact a clear case of dealing with bankers in the ordinary way of their business. *Stevenson v. Blakelock* (d) shows that the rule of law is, that where a right to general lien exists in any person, it is not taken out of him by the fact that a particular thing coming into his hands is received for a special purpose : if it comes into his hands in the ordinary way of business, the right to lien attaches. [*The Lord Chancellor*.—Was it not the attorney's duty there to receive the lease ?] It was no more his duty to receive the lease than it was the duty of these bankers to receive the exchequer bills,—it was a mere ordinary transaction in the way of business, and so Lord *Ellenborough* describes it (e).

In the judgment in the Court of Common Pleas in this case, the fact that an exchequer bill is transferable by delivery, is admitted ; yet it is supposed that, as there was no specific pledge of these bills, no right of lien

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(b) 3 Bro. Ch. Cas. 21.

(d) 1 Maule & S. 535.

(c) 7 Taunt. 278; 1 B.

(e) *Id.* 543.

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second plea, that they were not possessed, &c., relying on the lien claimed for the balance due to them from *Edward Burn*.

The usage of trade by which bankers are entitled to a general lien, is not found by the special verdict, and unless we are to take judicial notice of it, the plaintiff is at once entitled to judgment. But, my Lords, I am of opinion that the general lien of bankers is part of the law-merchant, and is to be judicially noticed—like the negotiability of bills of exchange, or the days of grace allowed for their payment. When a general usage has been judicially ascertained and established, it becomes a part of the law-merchant, which courts of justice are bound to know and recognize. Such has been the invariable understanding and practice in *Westminster* Hall for a great many years; there is no decision or *dictum* to the contrary, and justice could not be administered if evidence were required to be given *toties quoties* to support such usages, and issue might be joined upon them in each particular case.

It is hardly disputed that, under the plea of “not possessed,” a lien, where it exists, may be made available as a defence; and, therefore, if this special verdict sets forth facts which show that by the law-merchant the defendants have a lien upon these exchequer bills, the judgment in their favour ought to be affirmed. But I am humbly of opinion that, upon the facts found, there was no lien, and that the judgment ought to be reversed.

I do not, however, proceed upon the ground taken by the Court of Common Pleas,—that these exchequer bills being the property of *Brandao*, there was no lien as against him, although there might have been as against *Burn*. I think that the defendants were entitled to consider the exchequer bills as the property of *Burn*, without any express representation by him to that effect. Exchequer bills are negotiable securities passing by delivery. The holder of negotiable securities is to be assumed to be

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with a right of lien, as to return them absolutely, at all events, to the depositor, the case would have been different."

Now it seems to me, that, in the present case, there was an implied agreement on the part of the defendants, inconsistent with the right of lien which they claim. It should be recollected that the exchequer bills for which the action is brought, are the new exchequer bills, which the defendants obtained for the express and only purpose of being delivered by them to *Burn*, that he might deposit them in the tin box, of which he kept the key. They not only were not entered in any account between *Burn* and the defendants, but they were not to remain in the possession of the defendants; and the defendants, in respect of them, were employed merely to carry and hold till the deposit in the tin box could be conveniently accomplished. Whether this deposit was to be made in the same hour in which the securities were obtained from the Government, without ever being placed in a drawer belonging to the defendants, or after the lapse of some days, seems to me quite immaterial, bearing in mind the purpose for which they were obtained, and for which they remained in the defendants' possession. Nor can it make any difference that, on the particular occasion out of which this action originated, from the illness of *Burn*, so long a time elapsed from the obtaining of the securities, without their being demanded by him, for the purpose of being locked up in the tin box; for if the defendants had not a right of lien upon them the moment they obtained them, the actual lien clearly could not afterwards be claimed when his account had been overdrawn. Nor, I presume, can any weight be attached to the circumstance that the tin box, in which the exchequer bills were to be locked up, and of which *Burn* kept the key, remained in the house of the defendants. Were not these exchequer bills obtained by the defendants to be delivered to *Burn* who was himself

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to be the depositary and custodian of them, have a lien on all securities deposited with bankers; but these exchequer bills cannot be said to have been deposited with the defendants.

During the argument in the Exchequer Chamber, it was very properly admitted by Sir Fitzroy Kelly that bills of exchange were delivered to a banker for the purpose of being deposited in a box, then to be returned to the depositor, "with a lien." Does it signify whether the defendant deposited the securities in the box themselves, or required them to *Burn* for that purpose? I think, that under the circumstances, bankers acquire no lien, either on the bills to be exchanged or the bills received. It is hardly denied that if there had been an undertaking by the defendants to exchange the old bills to return the new ones as soon as obtained, the defendant might lock them up, no lien would have been acquired. But the special verdict shows the course of dealing between them, and raises an implied promise on which operates as if it was express. This is to be like the case put of bank notes given to a customer to procure a bank post-bill for a customer, or a purchaser to pay ready money, which excludes there could be no implied right inconsistent with the former obligation.

toiners, and to exchange the exchequer bills when such interest is paid," but there is no finding that the exchequer bills for which this action is brought and on which the lien is claimed were in the possession of the defendants in the course of their trade as bankers, or that it was their duty as bankers to perform these offices. I think that the transaction is very much like the deposit of plate in locked chests at a banker's. A special verdict might find that it is the custom of bankers, in the course of their trade as such, to receive such deposits from their customers, but I do not think that from that finding a general lien could be claimed on the plate chests. In both cases a charge might be made by the bankers if they were not otherwise remunerated for their trouble.

I further beg leave to observe, that, in a course of dealing like this, where the old exchequer bills are immediately to be delivered to the Government, and the new exchequer bills to be locked up in the box of the customer, it can hardly be supposed that the bankers will accept or pay bills of exchange for their customer on the credit of securities that in the usual course of dealing are for so short a time to be in their custody.

No reliance, I think, can be placed on the circumstance of the interest received on the old exchequer bills going to the credit of the account of the customer; for while he gives the bankers the interest to keep for him with one hand, he locks up the new exchequer bills in his tin box with the other.

Upon the whole, my lords, I should humbly advise your lordships to give judgment for the plaintiff in error. This judgment will leave untouched the rule that bankers have a general lien on securities deposited with them as bankers, but will prevent them from successfully claiming a lien on securities delivered to them for a special purpose inconsistent with the existence of the lien claimed.

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lock and key in the same place of deposit. It is impossible, considering how this business was carried on, that we can come to any other conclusion than this,—that it was an understanding between the parties that the new bills were to be returned after the interest was received, or after the old bills had been exchanged. If so—if that was the understanding—or if that was the fair inference from the transaction, it is quite clear that there could be no lien; that it does not come within the general rule; and what my noble and learned friend has stated, I think is perfectly correct, that although from the accidental circumstance of the illness of Mr. *Burn* these particular bills happened to remain for a longer period in the hands of the bankers than was usual, that accidental circumstance alone will not vary the case, nor give the bankers a lien, if under other circumstances that lien would not attach.

I therefore entirely concur in the judgment of my noble and learned friend.

Judgment of the Court below reversed.

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tified, founded, and in manner underwritten, and upon the conditions after specified, provided three burseris (a) of philosophy to be educated, brought up, and maintained, every one of them, for the space of four years, at the King's College of *Old Aberdeen*, according to the manner, measure, and quality, and as the rest of the burseris of philosophy, presently in the said college already founded, are educated and entertained." The deed proceeded to specify the condition and provision "whereupon the present mortification, disposition, and resignation after specified is granted expressly." This condition was, that the three bursars were to be presented by "Sir *Thomas Burnett*, of *Leys*, and his heirs male and successors, lairds of *Leys*," and that the Principal and Professors were to be bound to admit them. To secure the enjoyment of this right of presentation to Sir *Thomas Burnett* and his heirs, the deed contained the following provision:—"If it shall fall out that in any time coming the masters and members of the said college shall prejudge and wrong the said Sir *Thomas* of his presentation, and shall refuse and not accept whom they shall present to them to any of the said three burseris, then and in that case it is specially agreed and provided by the tenor of these presents, that this present mortification, with the disposition and resignation after specified, shall be null of itself, and have no strength, force, nor effect, as if the same had never been made, and the said Sir *Thomas* and his foresaids shall have regress to the lands and others after specified, notwithstanding these presents." The deed then proceeded thus:—"And to the effect the said three burseris may be honestly maintained at the said college, and for defraying the charges and expenses of their entertainment, the said Sir *T. Burnett* binds and obliges himself, his heirs and successors, as well heirs male as heirs of line, tail, or provision, and

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(a) This word meant bursars, not bursaries. There was at first some doubt as to its real meaning.

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heirs and successors whatsoever, heritably and irredeemably to sell, assign, alien, and dispose, like as by these presents he for himself and his foresaids, sells, alienes and disposes heritably for the entertainment of the three burseris above written to Dr. *Wm. Guild*, Principal of the said college, and Mr. *James Sandelands*, civilian and Common Prior of the same, and the remaining masters and members thereof, and their successors in their places all and whole the lands described in the said deed." The heads of the college happened to be superiors of these lands, and as such entitled to the annual feu duty of 24 pounds *Scots*, being about one-fourth of the beneficial value of the lands at the date of the foundation, and also entitled to the fines on death or alienation and other casualties implied by the feudal tenure. For the purpose of completing the conveyance of these lands, Sir *Thomas Burnett*, by the same deed, resigned the lands into the hands of these persons and their successors in office, "to remain with them for the aliment and entertainment of the said three burseris, and according to the provisions and conditions above expressed." The heads of the college, in their official capacity, accepted the resignation, and discharged Sir *Thomas Burnett* of all arrears of feudality.

The Principal and Professors entered into possession of these lands in 1648, and they and their successors have possessed them ever since, and have kept accounts among the accounts of estates belonging to them, and not among the accounts of estates which they only held in trust for charitable purposes. For a great number of years the lands were insufficient for the maintenance of the bursars, but the Principal and Professors allowed out of the ordinary revenues of the college such a sum as, together with the profits of the lands, sufficed to maintain the three bursars in a manner similar to that of other bursars maintained in the college, and had their allowance raised at the same time that the allowance to the foundation bursars was

raised, and to the same amount. They were paid 5*l.* sterling a-year each. The profits of the lands afterwards increased, and for some years past the annual revenue appeared to have been equal to 300*l.* The same ancient payments were still continued to the three bursars. The present respondent, as heir male and successor of the founder, and laird of *Leys*, instituted this suit against the appellants, and after stating in his summons the history of the foundation, the revenues of the lands, and the payments made out of the same, prayed that it might “ be found and declared that the defenders hold the said lands, and are bound to administer and apply the whole revenues of the same for the behoof of three bursars to be presented from time to time by the pursuer and his successors in terms of the deed of mortification, and for the entertainment and maintenance of the said three bursars of King’s College aforesaid.”

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The case came before the first division of the Court of Session, when a majority of the lords pronounced the following interlocutor :—“ Find and declare, in terms of the amended summons, that the defenders hold the lands referred to in the summons, and are bound to administer and apply the whole revenues of the same for the behoof of three bursars, to be presented from time to time by the pursuer and his successors, in terms of the deed of mortification, and for the entertainment and maintenance of the said bursars of King’s College.” The appeal was against the decree.

Mr. *James Parker* and Mr. *Macpherson* for the appellants :—

The gift here is of the whole rent of the estates for charitable purposes. The payments, therefore, cannot increase. The donor has founded a certain number of bursaries on a certain definite scale ; he has granted lands to an eleemosynary body for the purpose of maintaining these bursaries ; and so far as his gift is concerned,

took them. The first great principle intention shall prevail. That principle Lord Eldon in the case of *The Att Corporation of Bristol* (d), where n were cited, and was fully acted on in *Warreyn* (e). The same rule was in the case of *The Attorney General* (f), where the principle was fully rule that the construction of a deed must be governed by the intention authoritatively applied. *The Thetf* has been misapprehended. In the f unlike that of *The Thetford School* ment of the value of the estate at the the next, it is clear, that when a body u a charitable object, and receives a gif necessary for that purpose, it is still object into effect. The case of *The The Coopers' Company* (h), shows tha was there held, that if a testator clea tion of devoting the whole income of table purposes, then, although he doe directing the application of portion exhaust the whole income, still the g the whole shall be applied to char prevail; and, on the other hand, al

make any such general declaration, but gives each and every portion of the whole income existing at the time to some charitable purpose, and by that means exhausts the whole, then, if the income should afterwards increase, the increase will also be applicable to charitable purposes.

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The supposition that, in such a case as this, the doctrine of resulting trusts applies, is erroneous. The Principal and Professors of the college here gave a consideration for what they received. The amount of that consideration is immaterial; its existence prevents any resulting trust arising for the benefit of the heir. The conveyance of the lands is a conveyance out and out to the college; and the college, having a valuable interest, gave up that interest as part of the consideration. The very clause of forfeiture, on the ground of refusal of the stipulated right of patronage, shows that the college had a beneficial as well as legal interest in the subject-matter, and that, consequently, even within the cases which have established the doctrine of resulting trusts for the benefit of the heirs of a donor, no such trust could arise here. Where a party has a beneficial interest in a fund, he cannot be the mere recipient of the fund for the benefit of the *cestui que trust*, *The Attorney General v. The Cordwainers' Company* (i). And it is besides to be observed, that the deed of gift expressly declares, that in that case only is the gift to the college to be interfered with. No trust is created of the rents, and no account is required to be rendered, nor are the bursars made the only persons to whom the rents are to be paid. The rents are to be applied for their benefit in the purchase of the "*asiamenta*" (k), as they

(i) 3 Myl. & K. 534.

(k) It appears from the charter of foundation of the college, that the foundation bursars (to whom the *Leys* bursars were assimilated) enjoyed a money payment, together with chambers "et allis asiamentis," within the college.

Certainly; the intention of the donor is the guide. To the rule that a stinted charity does not grow, there are exceptions:—first, that established by *The Thetford School Case*, where the rent is identical with the benefits given to the charity, and the whole is doled out to the charity, though in specified portions; and, secondly, as in the case of *The Attorney General v. Arnold* (p), where a charitable purpose was impressed upon the whole property, though the whole was not exhausted by the charitable payments specified. These cases, it may be here remarked, establish this further distinction already noticed, that where the grantee of the fund is an eleemosynary body, if the specified payments do not exhaust the fund, the surplus goes to the grantee, a doctrine clearly laid down by Lord Chancellor Brougham, in the case of *The Attorney General v. Smythies* (q). *The Thetford School Case* does not in fact lay down any rule, but is an exception to well established rules; and where land is taken with the condition to make good a certain sum, the taker must be regarded as a purchaser entitled to the benefit of any surplus that may afterwards arise. The college here took the land on that condition, and has performed it, and is entitled to the surplus now that one has arisen. The constitution of colleges being monastic and regular, that is where all the members of each class were on the same footing, prompted persons to make benefactions and to found gifts of this sort. It became a common practice for a founder to convey such a piece of land, or to bind his heirs or trustees to pay so much money to a college for certain purposes, such as the maintenance or education of new members. The college kept the gift and maintained its new members, not by paying to them the exact proceeds of the gift, but by adding them to its foundation, upon precisely the same footing as other

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(p) Shower's P. C. 22.

(q) 2 Russ. & Myl. 740.

relied upon by the other side is in favour of the respondent. At the time of this gift there was nothing to lead the parties to presume that the estate was more than sufficient for the purposes to which the donor intended to appropriate it. There was consequently nothing to lead to the consideration of any necessity for making a specific appropriation of the surplus. But that the donor could not have intended to give "the Principal and Professors of the college" any benefit from any increase in the value of these funds is clear from the fact that he did not vest in them the right to present to these bursarships. He reserved that right to his family. So far, therefore, as he could, he intimated an intention that any benefit derivable from the gift, if there could be any beyond that which was vested in the bursars, should belong to his family.

It is asserted on the other side, that at the time of the deed the fund was insufficient; but that fact itself excludes the supposition that if there should be any surplus the donor meant that it should go to the college. It is a mistake to suppose that the college incurred any obligation under this deed to add one single shilling to the fund in order to carry out the will of the donor. [Lord *Cottenham*.—If the funds were insufficient, would the Principal and Professors of the college have been justified in reducing the advantages to these bursars?] They would; and even in diminishing the number of the bursars. Suppose the whole estate could have sunk in the sea, it is clear that the college would not have been bound to maintain the bursars. There was nothing but a trust created. The donor gave his property to support the bursars; the college accepted it for that purpose, and accepted it on the condition, that if the property should be perverted to other purposes, the donor might take it back again. This is all the effect of the deed itself: nothing more can be added to it but by implication, which the law will not allow here. [Lord *Cottenham*.—All the cases turn on

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these three bursars. There is not, deed, any contract or covenant by the feoffors of the college to maintain the particular manner. The college was bound to maintain them if the estate by any convulsion of nature. If they have been bound to maintain them, been lost or destroyed, it is equally to maintain them in the case of a defect, therefore, as intention is concerned, found anything declaratory of an intention on one hand, the bursars should be provided for, on the other, that after providing a surplus should go to the college.

Then, as to the principles to be deduced from these cases. It may be admitted, that if it appears from the deed, or upon undoubted evidence, that the estate was conveyed to any body of persons, and had then pointed out the object to which that estate was to be applied, at the same time the surplus of the estate was unapplied to any particular purpose, the estate itself might increase in value, it would go to the donee or his successors. But in no case is that the case here. There is not any evidence been held, that the donees are entitled to it does not appear on the face of the

The whole of the law on this question is to be found in two *Scotch* and two *English* authorities. The first of these is the case of *Ramsay v. St. Andrew's College* (u). [Lord Campbell.—The dispute there was not whether the college had a beneficial interest, but whether there should be an increase in the number of the bursars.] But the principle of that case is applicable to the present. That was a mortification of lands for the “education and entertainment” of three bursars: the rental having increased, a contract was entered into between the patron and the administrators of the mortification, to increase the number of bursars in proportion as the rental should increase: this contract, after having been acted on for more than forty years, was reduced, on the ground of its being in violation of the deed of mortification. It never appears to have occurred to the minds of the judges there that the surplus was to go to the college. [Lord Campbell.—Nothing was said on that point. The only question argued was, whether the existing students should have the benefit of the increased funds, or the number of students should be increased. Lord Cottenham.—In that case it was provided that the students should feed at the table “in the quality of seconders.” If the only object of the donor was to maintain them, what could be the meaning of referring to the quality of other students of a particular class? The income might be much larger than was required for such an object.] The only object was, that they should be, if possible, at least as well lodged and fed as the students of that class. The donor did not anticipate the change of circumstances that might take place in time, and enable them to be better lodged and fed than the others, but merely looked to things as they then existed. [Lord Cottenham.—Then why specify the mode in which they were to be maintained?] It was a mere matter of description: it meant

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(u) 4 Dunl. Bell & Murr. 1366.

dents are maintained." In another might be sufficient to maintain not in the same manner. What would be the consequence if it were considered that the description given to the trustees as to the mode of the application was not to restrict its application but to increase it? Such a description is necessary to the trustees what they are to do, and was it introduced in the case cited.

Another case in point is that of the *Thetford School* where rents were mortgaged for the benefit of hospital paupers. The rents increased and the pauper received 40l. a-year; but the trustees interfered and directed a new application on the ground that it could not do so without the sanction of the donor. That case is a strong support to the argument now contended for.

The *Thetford School* case (*w*) is now before the court. The resolution there adopted was "grounded on evident and apparent facts, that the lands had decreased in value, the poor people, should lose; and if the lands increase in value, *pari ratione*, the poor people, should lose; and the Lord Chancellor Brougham, in *The Brazenose* (*x*) thus described and decided that case:—"The *Thetford* case goes

cases where nothing is said that the question can arise), then you may safely assume that it is given to the charity out and out, and not to the trustees, if it is not exhausted by the gift to that charity." And his lordship then proceeds to illustrate in detail this principle, and shows that where the whole income of the charity is not specifically given, but any surplus remains, the trustees are entitled to the surplus; but that where the whole fund is, as it is here, appropriated, then the charity itself receives the benefit of any increase.

It is not true that the college was bound to maintain these bursars at all events. It has already been submitted, that if a convulsion of nature could have destroyed the lands, the obligation of the college would have been at an end. The same proposition would be equally true in principle, if the lands became inadequate to the maintenance of the bursars, for the clause of forfeiture relates only to the disobedience to the claim of patronage, and, that claim having been admitted, the bursars, if the lands proved inadequate for their maintenance, might have been left to subsist on what those lands afforded them. As, therefore, they must have suffered from the inadequacy of the fund, they, and not the Principal and Professors, are entitled to the benefit of its increase.

Then it is said, that here the college gave some valuable consideration for the transfer of this property, and that that makes a difference in the construction to be put on the grant. That argument is not warranted by the fact. The college merely gave up something, the retention of which might have prevented the gift from being made. It was not a valuable consideration for the gift; it was a voluntary contribution towards an object, which the college was willing to promote. No argument, therefore, can be founded on that fact; and the other arguments for the appellants being equally inapplicable, it is submitted

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I do, from the opinion of the majority of the Court of Session, by whom the interdicts were pronounced, it is satisfactory that the question does not turn upon any point of law to the law of *Scotland*, but upon the construction of the instrument by which it was founded, to be regulated indeed by the former decisions, of which none has been in *Scotland* directly applicable to the present case, but of which many are to be found in *England*.

It is important, in cases of this kind, that the same rules of construction should, as far as possible, be the same in the two jurisdictions, and in the present instance, any difficulty in the application of the established rules, which have been followed upon in this country, to the decision of the Court of Session. In so doing, no principle which has been acted upon in *Scotland* will be infringed, and no decision affected.

It is unnecessary to go higher than Lord Eldon, in *The Attorney General v. The Mayor of London* (1809). In that case that very learned Lord distinguished the former decisions from the earliest to the latest, and from them rules which he acted upon.

apply the income, in certain specified payments, to certain charities, of one of which they were the trustees. And he said that intention was the principle, and that the several rules were only indexes of the intention; that one of those rules was, that if the donees were to lose, should the fund decrease in value, they ought to gain if it increased; and he came to the conclusion that the fund was given to the corporate body, subject to the charge imposed, and not as mere trustees.

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In *The Attorney General v. Cordwainers' Company* (z), the devise was to a corporation for the purposes of the testator's will, and he gave half of the rents to his brother for life, and directed that the devisees out of the remainder should pay certain specified charities; and he gave the whole to his brother in fee, if the corporation should neglect to perform his will. Sir *John Leach*, Master of the Rolls, thus expressed himself: "This is a gift upon condition, and not merely a trust; the condition of forfeiture proves the intention to give a benefit; the imposition of a penalty for non-performance of the condition implies a benefit, if the condition be performed."

In *The Attorney General v. Smythies* (a), the corporation consisted of one warden and five poor brothers; and it was directed that, out of the rents, 52s. yearly should be paid to each poor brother, and that the remainder should be applied to support the warden and poor of the hospital, and for repairs. Lord *Brougham* said that if a fund be given to one body, subject to certain payments to other parties, the latter can only take what is given as a charge, and the surplus must go to the donee of the fund, unless there should be circumstances clearly indicating a contrary intention. Many other cases might be referred to, confirmatory of these rules.

In *The Attorney General v. Fishmongers' Company* (b),

(z) 3 Myl. & K. 535.

(b) 5 Myl. & Cr. 11.

(a) 2 Russ. & M. 717.

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I had occasion to consider these decisions, and recognise the doctrine upon which they were grounded.

The result of these decisions is, first, that, generally speaking, in searching for the intention of the donor, will be assumed that he intended to confer a benefit upon the donee, in the enjoyment of any increase of the fund should such gift be to the donee, subject to certain payments to others; 2ndly, if the gift be upon condition of making certain payments, subject to a forfeiture upon non-performance of the condition; or, 3rdly, if the donee might be a loser by the insufficiency of the fund, which indeed is consequential upon the last. In the present case all these rules concur; independently of which there are provisions and expressions strongly confirmatory of the intention in favour of the college. It is not a gift, but an agreement, for which some pecuniary consideration was given by the Principal and Fellows of the college, who were the superiors of Sir *T. Burnett's* lands, and who released to their vassal, the donor, certain feu duties the due. The deed expresses the motives for the gift, which are—1st, the promotion of learning generally; 2nd, giving instructions to those who could not afford to purchase it; and, 3rd, the donor's respect and affection for the college. It then provides that the three bursars of philosophy are to be maintained and educated according to the manner, measure, and quality, and as the rest of the bursars of philosophy, presently in the college already founded, are educated and entertained; and it provides for the presentation to three bursarships by the donor and his family, upon pain of forfeiture of the gift by the college if they shall not give effect to it. The donor then, for consideration and upon the conditions before expressed, resigns to his superiors, the Principal and Fellows of the college, the lands in question, and warrants the same against his own acts, and the Principal and Fellows accept it according to the conditions and provisions before re-

heard, and discharge the feu duties from a certain day ; and it is stipulated that the donor shall retain the last charter, and the confirmation of it by the college, not for the purpose of receiving any title or interest in case the Principal and Fellows shall not fail in the performance of the conditions of that modification, but only in case they should invert that modification, and not observe the conditions above rehearsed, then that the donor might the more easily re-enter the property.

It is true that, before the granting part of the deed, it is said:—"To the effect the said three bursars may be honestly maintained at the said college, and for defraying the charges and expenses of their entertainment," the donor bound himself and his heirs to sell and dispose, and did thereby sell and dispose, for the entertainment and maintenance of the three bursars above written, the lands in question ; terms which, standing alone, might seem to devote the whole to the maintenance of the three bursars ; but it proceeds:—"to remain with them for the aliment and entertainment of the said three bursars, and according to the provisions and conditions above expressed," which refers to the recital of the agreement, providing that those three bursars shall be brought up, educated, and maintained, according to the manner, measure, and quality, and at the risk of the bursars presently in the college." This reference to the manner, measure, and quality of the education and maintenance of the bursars, already existing, fixes and limits the measure of expenditure to be bestowed upon the three newly endowed, as effectually as if specified sums had been directed to be so applied for that purpose ; but this does not appear to have been sufficiently attended to in the former stage of this cause, which may account for *The Perth case* (c) having been referred to, as not only applicable to, but as

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and after enumerating the reserved r
proceeded in this way :—" which yes
founder willed, required, and desired t
and bestowed for and towards the su
tenance in the said hospital of the sai
In this there is no limit, by referenc
the extent to which the poor persons
with the rents, but all the rents then
applied for their benefit. That case
stance which leads to a proper concl
case, which is a gift to one charitabl
to a condition for payment of certain
fit of others, whether the income fall
such sums, and with a proviso of forfe
formance of the condition, embraci
itself all the grounds upon which it h
cases before referred to, or decided, i
donees are entitled to the increase of
opposed by any case in *Scotland*. Th
the principle to be applied, must be
countries, namely, to discover and ac
of the donor, and it would have been
ferent rules had been adopted in th
for the purpose of carrying this p
Fortunately that is not the case, and
to us, and it is most desirable to appl
ciples which have been so long and e

unnecessary to advert to the usage which has prevailed, amounting to a contemporaneous exposition of the meaning and intention of the parties ; and I shall only say that nothing advanced in argument in this case has induced me to hesitate as to the importance and correctness of the rule to which I alluded upon this point in the case of the *Attorney General v. Fishmongers' Company* (d). I therefore move your Lordships to reverse the interlocutor appealed from, and in lieu thereof to assilzie the appellants from all the conclusions of the libel, with the costs of the suit, but of course without any costs of the appeal.

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Lord Campbell.—My Lords, I entirely concur in the view taken of this subject by my noble and learned friend. It seems to me that the donor here has most anxiously provided that these three bursars should in all time to come be upon the same footing as the rest—that there should be no difference made. According to the donor's notion, the privations to which they might still be subject might be thought calculated to stimulate their industry, and might bring them under a discipline which, according to his notion, might fit them for acting a useful part in life. Then it being quite clear that you would violate the intention of the donor if you were to put these bursars on a better footing than the other bursars of the college, I think that the construction which would give the whole of the increased rents and profits to these three bursars, could not possibly be the right construction to be put upon this instrument. Looking to the whole transaction, it seems to me that it was a kind of bargain between the donor and the college for better and for worse. The college undertook that if the rents and profits should fall off, still those three bursars should remain on the footing of the other bursars of the college :

(d) 5 Myl. & Cr. 11 ; see p. 83.

2 1770 Case (e), which was taken up
to the present, and I am sure that 2
lege Case (f) had as little. There
there were words expressly used, an
just the very reverse of these, indic
who were established should have th
be they great or be they small.

Interlocutor reversed.—Appellant
of suit below, but not with costs of

(e) Bell's Fol. Cases, 173.

(f)

MICHAEL CAIRNS AND OTHERS	-	<i>Appellants,</i>	1846.
The Rev. JAMES RAINE	-	<i>Respondent.</i>	June 18, 25,
			26;
			August 28.

To a bill by the rector for an account of tithes against the owner and occupiers of land in the parish, they set up a *modus* of 13*l.* 6*s.* 8*d.*, payable half-yearly; and they showed receipts for that payment under various descriptions, as "rent for the rectory," and "prescribed rent due to the rector," from the year 1637, with some interruptions; and also receipts for a payment of 8*s.* 9½*d.*, which was supposed to be a payment in respect of tenths due from the rector to the Crown.

Tithes.
Modus.
Issue.

Held, by the Lords, affirming a decree for an account, that the case made by the appellants would not warrant the Court to direct an issue to try the existence of the alleged *modus*, the evidence against it being free from doubt.

A landowner cannot, like a rector, insist on an issue as a right; but in doubtful cases it is granted.



THE respondent, rector of the parish of *Meldon*, in the county of *Northumberland*, to which he was inducted in 1822, filed his bill for an account of tithes against the appellants, who are in possession of the whole of the lands in the parish, Mr. *Cookson*, one of them, being the owner, by purchase, in 1832, from the commissioners of *Greenwich* Hospital. The manor and lands of *Meldon* formed part of the estates forfeited by the Earl of *Derwentwater*, in 1715, and were afterwards granted by the Crown to the hospital. No tithes were rendered in kind to the rector in 1822, or to his predecessors for at least 200 years; but there were two money payments, one, the

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sum of 13*l.* 6*s.* 8*d.* a-year, payable by half-yearly payments, and called in the receipts, "rent of the rectory, "prescribed rent due to the rector of *Meldon*;" the other, a sum of 8*s.* 9½*d.*, payable yearly, at *Christmas*, as in the receipts called "for the tenths of *Meldon*, due to the rector of *Meldon*." The rector, soon after his induction, entered into a correspondence with the commissioners of *Greenwich* Hospital, the result of which was, that they agreed not to insist upon the said money payments, provided the rector would engage not to make a retrospective claim for the value of tithes. From that time until 1832, the respondent received tithes from the tenants of the land. In 1832, Mr. *Cookson* purchased the manor and lands from the commissioners of the hospital (who were empowered by act of Parliament to sell), and resisted the rector's claim for tithes, but tendered to him the two money payments, whereupon he filed the bill, charging among other things, that the appellant, *Cookson*, purchased the lands with a knowledge that they were liable to tithes, and that he was bound by the hospital's said agreement, even if the said money payment had been valid *modus*.

The appellants, in their answers, relied on the money payment of 13*l.* 6*s.* 8*d.* as a valid *modus*.

The Vice-Chancellor decreed for an account of the tithes. The pleadings and the material parts of the voluminous evidence in the cause are fully stated in his honour's judgment: 4 Hare, 328.

Sir *Thomas Wilde* and Mr. *Tinney* for the appellants. A fixed sum of 13*l.* 6*s.* 8*d.* yearly, had been satisfactorily proved to have been paid to the successive rectors by the owners for the time being of the lands for above 200 years prior to the filing of the bill, and the same appears to have been accepted by the rectors for the time being in lieu and full satisfaction of the tithes, great and small. There was

no evidence that the payment of the fixed sum in lieu of tithes originated in an agreement, alleged on behalf of the respondent to have been made in the year 1639; on the contrary, the first receipt for it is dated two years prior to that date, and no evidence was given of the origin of the supposed fixed sum or prescribed rent within the time of legal memory, the payment of which was wholly unconnected with, and distinct from the payment of the tenths of *Meldon*, separate receipts being given for them, and the latter being treated, in one receipt, as of doubtful obligation, whilst the payment of the fixed sum or prescribed rent was always considered and expressed to be certain and compulsory.

The ancient surveys, valuations, and other documents produced on the part of the respondent, are not conclusive against the *modus*, or of sufficient weight or authority to negative the existence of the fixed sum or prescribed rent as an immemorial payment. The fluctuations in value of the rectory, as appearing by the ancient surveys, may be accounted for by the frequent incursion of the *Scots*, and the ravages and disturbances from time to time in the border counties, by which the lands in *Meldon* were sometimes laid waste.

There was no evidence of the perception of tithes in kind by the rectors, or of any temporary composition in lieu of tithes, excepting during the interval between 1822 and 1832. Such payment to the respondent cannot be held to have charged the lands with the payment of tithes *de novo*, or to have affected the validity of the *modus* previously existing. The appellants were not bound by the acts of the commissioners of *Greenwich Hospital* in waiving the further payment of the prescribed rent to the respondent, or otherwise estopped from insisting upon the same as a *modus*. If there was any doubt of the validity of the *modus*, an action or issue ought to have been directed.

A great part of the documentary evidence which was

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received *de bene esse*, was not admissible at all, and no effect ought to have been given to it.

Mr. *Bethell* and Mr. *Purvis* for the respondent. The decree made by the Vice-Chancellor for an account and payment of tithes was properly made, without an issue being directed to try the validity of the *modus* insisted upon by the appellants. The ancient surveys, taxations, and accounts produced by the respondent proved that no such payment as the alleged *modus* could have been payable for the tithes of *Meldon*, at periods subsequent to the time of legal memory. They were made by competent judges, under the sanction of an oath, and show that the church of *Meldon* was of very variable value at those periods, and sometimes of no value, and never of the value of the alleged *modus*. The appellants' proof of the alleged *modus* of 13*l.* 6*s.* 8*d.* was based wholly upon the receipts given for that sum, in the hands of the commissioners of *Greenwich* Hospital, whereas such receipts affirmatively import the receipt of rent for the rectory of *Meldon*, and not the receipt of a sum paid in lieu of tithes of lands in the parish of *Meldon*. The payment of the tenths of the rectory to the rector, by the owners of the manor and estate of *Meldon*, and the payment by them of other charges and expences to which the rector was

and made, had their origin at a period subsequent to the making of the survey. The payment for the tenths could not be separated from the payment of the rent, and the *modus* insisted upon by the appellants was a part only of the recompense which was due from the owners of the estate of *Meldon* to the rector, under the contracts between them; and the *modus* is in that respect defectively laid, and is not supported by, or consistent with, the evidence in the cause.

The appellants are bound by the relinquishment of the alleged *modus* by the commissioners of *Greenwich Hospital*, under whom they claim, the same having been relinquished, after full investigation, and also upon good consideration, as between the respondent and the commissioners—the appellants, *Cairns* and *Wardle*, having taken their lands from the commissioners, as subject to the payment of tithes; and the appellant, *Cookson*, having purchased the estate, with notice of the relinquishment of the *modus*, and upon the assumption that the estate was subject to tithes.

Lord Campbell.—This being a bill by the rector of the parish of *Meldon* for an account of tithes, to which a *modus* was pleaded, I conceive the question for your Lordships to determine is, whether the Vice Chancellor, *Sir James Wigram*, was justified in decreeing an account without first directing an issue to try the existence of the *modus*.

It is well settled that the landowner cannot, like the rector, insist as a matter of right upon an issue. Still if the question is at all doubtful, he is entitled to an issue. But if there be undisputed facts in the case inconsistent with the alleged *modus*, and if a verdict in favour of the *modus* must be set aside, there could be no use in granting an issue, and the Court without an issue ought to decide against the *modus*, and to decree an account.

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Here we have what may be considered *primâ facie* evidence of the *modus* pleaded; for there is no evidence of tithes having been taken within the parish in kind, or of any varying composition for tithes; and from the year 1637 till the year 1823, the whole of the land in the parish belonging to one proprietor, there has been a payment by him to the rector, by half-yearly payments, of the yearly sum of 13*l.* 6*s.* 8*d.* In the earliest receipt this called "the rent of the rectory of *Meldon*," and afterwards "the prescribed rent;" but the name given to it by itself means conclusive to show that it is not, strictly speaking, a *modus*. The landowner likewise very properly relied upon the Parliamentary survey, stating that the parsonage of *Meldon* is worth 13*l.* 6*s.* 8*d.*

If this case had been met by the rector merely with conflicting testimony, or doubtful facts, or evidence rendering the existence of the *modus* highly improbable, an issue ought to have been directed; but I am of opinion that by documents, the genuineness of which cannot be disputed, the position is clearly established that there could not by possibility have been in this parish, from the commencement of legal memory, a payment by the landowner to the rector of 13*l.* 6*s.* 8*d.* a-year for tithes, and, on the contrary, that this payment must have originated in comparative recent times, under an agreement that the landowner should pay a rent of 13*l.* 6*s.* 8*d.*, clear of all outgoings, to the rector for the profits of the rectory.

Among the documents which seem to me inevitably lead to this conclusion, are the *Norwich* taxation, in the year 1253; the taxation of Pope *Nicholas* thirty-eight years afterwards; the Inquisition in the year 1311; the Return in 1316; the *Nova Taxatio*, and the Inquisition *per mortem*, 5 *Henry* IV. These documents, showing the value of the land and of the living at different times, prove that the sum of 13*l.* 6*s.* 8*d.* was much more than the value of the tithe, and was much more than what t

rector received. Mere rankness would not be a sufficient ground of objection to the *modus*, but these documents prove that the alleged payment was not made.

Then the additional payment of 8s. 9½d. by the landowner to the rector, is wholly inconsistent with the *modus* of 13l. 6s. 8d., but is very strong evidence of the agreement between the landowner and the rector for a lease of the rectory at the latter sum, clear of all outgoings. In the *Valor Ecclesiasticus*, the living is put at 4l. 7s. 8d., the tenth of which, due to the pope, and afterwards to the king, is 8s. 9½d. This was properly a payment to be made to the rector, but which, under the supposed agreement, would be made to the landowner; and it appears to have been made by him to the Crown till the act, on the foundation of Queen *Anne's* bounty, exempting small livings from payment of tenths, which was passed for the relief of incumbents. Thenceforward the rector of *Meldon* would be entitled to the benefit of this sum, and it was paid by the landowner to him instead of being paid to the Crown. No ingenuity can explain this payment of 8s. 9½d. (which was undoubtedly the tenth of the estimated value of the living) by the landowner to the rector, except upon the supposition that, under an agreement for a lease of the profits of the rectory, the landowner had agreed to pay this sum among other outgoings. So the washing of the surplice, and other items in some of the accounts for things that would fall upon the church rate, are to be explained in the same manner.

I attach no weight to the arrangement for payment of tithe in kind by *Greenwich Hospital*, the former proprietors of the land, for this proceeded, in fact, on a representation by the rector, which was in several particulars inaccurate, and, at any rate, if there was a valid *modus*, this arrangement could not deprive the appellant, *Cookson*, now the owner of the land, of the right to insist upon it.

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But had the payment of the 13*l.* 6*s.* 8*d.* gone on without interruption down to the filing of the bill, I am of opinion that, upon the evidence, it must necessarily be considered conventional payment, and not a *modus decimandi*.

Some objections were made to the decree in as far as concerned Easter offerings, and the tithe of a mill, even supposing the *modus* to be disapproved; but these were sufficiently answered pending the argument.

For these reasons, I move your Lordships that the decree appealed from be affirmed, with costs.

The Lord Chancellor (Lord Cottenham).—If the evidence in this case had shown the immemorial payment of certain sum, and the non-reception of tithes from time immemorial, I think the principle, as well as the modern authorities, would have made it the duty of this House to send this question for trial before a jury, but the pressure upon the part of the appellants is for an issue. The first question to be asked is, what issue is it that the appellants ask the House to direct? If your Lordships look to the pleadings, you find that the only issue tendered is as to the *modus* of 13*l.* 6*s.* 8*d.*; but the evidence shows that, whatever may have been the history of this transaction, there could not have been a contract, at the time when such contracts were available, between the titheowner and the tithepayer, because it appears that, independently of the sum of 13*l.* 6*s.* 8*d.*, there was an annual payment of 8*s.* 9½*d.* made for the benefit of the incumbent; that is to say, a tenth payable to the Crown, when the Crown received the tenths; and after the Crown ceased to receive the tenths, it was bestowed upon the ecclesiastical authorities, and made payable to the ecclesiastical authorities.

If there be any discharge at all, it is not the 13*l.* 6*s.* 8*d.* which constitutes the consideration for the discharge, but it is the 13*l.* 6*s.* 8*d.*, and also that other payment of 8*s.* 9½*d.*

How that payment arose, or to what it is to be referred, is totally unexplained by the proceedings in the cause. The attempt made at the bar to explain it entirely fails, because it is a total failure to say that this must be attributed to the bounty of the owner of the land. That is not a usual motive to which we can apply an immemorial payment of a certain sum, whoever might be entitled to receive it, instead of being paid by the incumbent for the time being. Therefore, whatever my opinion may be—and certainly I wish not to say anything that may encourage future litigation in this case—whatever my opinion may be upon the facts, if they were applicable to an issue accurately tendered, it is clear that, as applied to the issue tendered in this case, the negative is established of an immemorial discharge upon payment of this 13*l.* 6*s.* 8*d.* I by no means mean to say, that framing the issue in the cause in another way, and setting up a different defence, would be attended with a very different result. It is certainly very much more like what my noble and learned friend has alluded to, and what was contended for at the bar, an agreement for a lease of the rectory, and that would undoubtedly have explained the two payments, whereas the payment in lieu of the tithes leaves the 8*s.* 9½*d.* totally unexplained.

For these reasons, I entirely concur in the view that my noble and learned friend has taken as to the conclusion to which we ought to come, namely, that this appeal should be dismissed, with costs.

Decree affirmed, with costs.

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I N D E X.

ACCOUNT. *See* ATTORNEY AND SOLICITOR, PRACTICE, TRUST.

When a defendant, who is himself a solicitor, by a mistake in practice, allows an account to be taken against him without objection, he is not entitled to have the accounts re-opened.—*Wallace v. Patton*, 491.

AGREEMENT. *See* MARRIAGE 1.

Semble, that a letter written and signed by a father, after the marriage of his daughter, admitting the terms of certain written proposals which had not been signed, was a recognition of them as his agreement, sufficiently signed by him under the Statute of Frauds.—*Hammersley v. De Biel*, 46.

ANNUITY.

A will contained these words :—" My will is, that whatever I die possessed of, or in any way entitled to, together with whatever property my wife may be any way entitled to, shall produce to my wife an annuity of 100*l.* per annum, to each of my daughters 100*l.* per annum for themselves and their children, and to my wife's mother an addition to any property she may possess, so as to make up to her, during her life, an annuity of 100*l.* per annum ; said annuities, after the decease of my wife and her mother, to be equally divided among my three children, William, Mary, and Julia Lousia. All the rest and residue of my property and possessions I give and bequeath to my son William." At the time of the testator's death his daughters had no children. Held that the annuities thus created were perpetual annuities. The testator's daughter, M., died, and after her death he made a codicil to his will, dividing her annuity between his two surviving children, but in other respects confirming the will. His wife's mother having died, he

made a second codicil in these words:—" And in case my son William shall die without leaving issue male lawfully begotten, my will is, that, after the decease of my wife and my daughter J. L., my remaining property shall then be equally divided between two relations named in the codicil, and their children. Held, that these codicils did not alter the nature of the annuities given by the will to Julia Louisa.

—*Stokes v. Heron*, 161.

APPROPRIATION AND DISAPPROPRIATION. See **RECTORY.**

ASSIGNEES OF BANKRUPT. See **PLEADING.**

ASSIGNMENT. See **PLEADING.**

1. A testator in *Scotland* gave all his property to trustees—first, to pay his debts; secondly, to pay Mrs. R., a married woman, so much of the annual proceeds as they might deem necessary for support of her and family during her life, declaring the same to be alimentary and exclusive of her husband, nor attachable, nor assignable, nor subject to any debts or debts of her or her husband. The acting trustee, with consent of Mrs. R., assigned to her alimentary creditor the rents of the trust property—first, to pay debts affecting it; secondly, to pay part of the rents to Mrs. R. for aliment; thirdly, to apply the residue in payment of the debts due to the assignee. Held that the assignment was void on three grounds, *viz.*; 1st. It was not competent to the trustee to substitute another person for himself in the trust—which was the effect of the assignment. 2d. The rule of law in *Scotland* requiring the concurrence of the husband in his wife's deed, could not be dispensed with by his absence abroad at the time, for a temporary purpose only. 3d. The assignment was void, as it violated the express prohibition against alienation; and in this respect the law in *Scotland* is the same as in *England*.—*Rennie v. Ritchie*, 204.

2. Under the 9 Geo. II., c. 5 (Irish Statute), payment, by the conusor of a judgment, to the conusee, without notice of the assignment of the judgment, is payment to the assignee thereof. The registration of the assignment under that statute does not operate as notice to the conusor. The situation of a conusor under this statute resembles that of a mortgagor, under the (English Statute) 32 Hen. VIII., c. 34.—*Boyle v. Ferrall*, 740.

ATTORNEY AND SOLICITOR. See **ACCOUNT.**

An attorney or law agent is only responsible in damages to his

client for gross ignorance or gross negligence in the performance of his professional services. A declaration, or a summons against an attorney or a law agent, to recover damages for loss occasioned by his mis-management of a cause, must charge gross ignorance or gross negligence, or must, at least, contain allegations of fact, from which the inference is inevitable that the defendant has been guilty of one or the other. The law as to both these matters is the same in England and in Scotland.—*Purvis v. Landell*, 91.

BANKER. See **BOND**.

BANKRUPT. See **PLEADING**.

BISHOP, RETURNS BY. See **EVIDENCE**.

BOND.

A surety is not of necessity entitled to receive without inquiry from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and that party. If he requires to know any particular matter, of which the party about to receive the security is informed, he must make it the subject of a distinct inquiry. An obligation to a banker by a third party to be responsible for a cash credit to be given to one of the banker's customers, is not avoided by the fact, that, immediately after the execution of the obligation, the cash credit is employed to pay off an old debt to the banker.—*Hamilton v. Watson*, 109.

BOUNDARIES.

By lease made in 1719 the lessor demised, for three lives, renewable for ever, all that part of the town land of B. containing 509 acres arable, meadow, and pasture, bounded on the south by D., on the north and east with L. N., and on the west with T.'s and W.'s land, with all rights thereto belonging, excepting and reserving all mines, quarries of stone and coal, and all royalties, and all timber above and under ground. There were several renewals of the lease in the same terms as to the contents and boundaries of the demised premises. Held by the Lords, affirming judgments of the Courts in *Ireland*, that 400 acres of B., bog and land reclaimed from bog, which were situated within the ambit of the specified boundaries, passes under the lease and renewals thereof, in addition to the 509 acres arable, meadow, and pasture.—*Jack, lessee of Dawson, v. M'Intyre*, 151.

COLONY. See **LEGACY DUTY**.

CONDITION. *See* DEED OF GIFT.

CONSENT. *See* PRINCIPAL AND AGENT.

CONTRACT. *See* AGREEMENT 1.—MARRIAGE.

CONUSOR AND CONUSSEE. *See* ASSIGNMENT.

CONVEYANCE. *See* CORPORATION.

A voluntary conveyance of real estates to a charity, is not defeated by a subsequent conveyance of them for valuable consideration.—*Mayor of Newcastle v. The Attorney General*, 402.

CORPORATION. *See* TRUST.

1. The Act 39 Eliz., c. 5, enables "all and every person and persons" to found hospitals for the poor, and to incorporate them:—a municipal corporation is included in the words "every person and persons," and may exercise the powers given by the act. A voluntary conveyance of real estates to a charity is not defeated by a subsequent conveyance of them for valuable consideration. Real estates conveyed to, and vested in an hospital founded under the Act 39 Eliz., c. 5, cannot be alienated by the hospital, nor can it confirm an alienation of them by the founders. A municipal corporation voluntarily founded an hospital, under the Act 39 Eliz., c. 5, and purchased real estates, and caused them to be conveyed to the hospital, but which were kept under the controul and management of the founders, who afterwards sold and conveyed them for valuable consideration, granting to the purchasers covenants for title and indemnity against the claims of the hospital. The founders applied the money produced by the sale, together with other monies of their own, in the purchase of an estate at W., and they paid annually to the hospital more than the rents and profits of the sold estates. The hospital at first concurred in that arrangement, and acquiesced in it for 120 years; after which the Attorney General and the hospital, by information and bill, claimed a part of the estate at W., bearing the same proportion to the whole estate that the produce of the sale of the hospital's estates bore to the whole purchase money of the estate at W.: Held, 1st., that the estates conveyed to the hospital were well vested in it, and could not be sold without an act of Parliament, and therefore a decree directing the hospital to confirm the sale is in that respect erroneous. 2d. That if the hospital's concurrence and long acquiescence in the arrangement for the sale of its estates were held to bar its

right to recover them, or a commensurate portion of the estate of W., the Attorney General's right to protect the charity still existed. 3d., Semble, that though the hospital's bill should be dismissed, the Attorney General's information would be retained.—*The Mayor of Newcastle v. The Attorney General*, 402.

2. A proceeding by information in the nature of a *quo warranto* will lie for usurping any office, whether created by charter of the Crown alone, or by the Crown with the consent of Parliament, provided the office be of a public nature and substantive office, and not merely the function or employment of a deputy or servant held at the will and pleasure of others. The office of Treasurer of the public money of the county of the city of *Dublin* is an office for which an information in the nature of a *quo warranto* will lie.—*Darley v. The Queen*, 520.

COSTS. See IMPERTINENCE.

When a decree is varied by the House, but only on a point which was not raised in the Court below, nor made a ground of appeal, the appellant must pay the costs of the appeal.—*Wallace v. Patton*, 491.

CROWN GRANTS. See EVIDENCE.

DAMAGES.

If charity trustees are guilty of a breach of trust, the person thereby injured has no right to be indemnified by damages out of the trust fund. The law is the same in this respect both in England and Scotland.—*The Feoffees of Heriots' Hospital v. Ross*, 507.

DEED OF GIFT.

In searching for the intention of a donor, which is the standard to govern the construction of a deed of gift, the facts, first that the gift is subject to the condition of making certain payments to others, secondly, that forfeiture will be incurred by non-performance of that condition, and thirdly, that the donee may be subjected to loss by the performance of that condition, are sufficient to raise the presumption that, in case of the increase of the fund, the donor intended to give to the donee the benefit of that increase.—*Jack v. Burnett*, 812.

DEVISE. See WILL.

DIVORCE.

A husband, immediately after his wife's elopement, brought an

action, and obtained a verdict for damages against the adulterer, and also proceeded against the wife in ecclesiastical Court, and obtained a divorce there, but for five years from the elopement, apply for a divorce in Parliament. The delay was held to be sufficiently accounted for by the absence of the wife in America, and the inability of the husband, in consequence of his affliction, to attend to any business.—*Heaviside's Case*, 333.

2. A husband lived separate from his wife for many years without making any provision for her maintenance means, which were sufficient: Held that he was not entitled to a divorce, though the adultery of the wife was proved.—*Simmon's Case*, 339.

3. In prosecuting a Divorce Bill, letters written by the husband admitting her adultery, but imputing the blame to her for neglecting her, and exposing her to temptation, are to be regarded more as excuses invented to palliate guilt than as founded in truth, and, therefore do not constitute strong rebutting evidence. The husband's attendance at the bar on the second reading of his bill for a divorce, in compliance with the standing order, No. 142, may be dispensed with, on petition of his attorney shewing sufficient cause for his non-attendance.—*Shuldham's Case*, 363.

DOMICILE.

The domicile which an owner of personal property has at the time of his death, determines whether it is or not liable to the legacy duty.—*Thomson v. The Advocate General*, 1.

DUBLIN, TREASURER OF.

An information in the nature of *quo warranto* will lie against the Treasurer of the Corporation of Dublin, if he is not a member of the Corporation.

pointed a commissioner for that purpose. *B.*, one of the landowners, authorized his agent to attend for him at the meetings held for the purpose of carrying the act into execution, but desired him not to exchange a particular wood except for wood land. *N.*'s lands were to be exchanged against those of *B.*, and this restriction was communicated to *N.*'s agent, who was asked to exchange another wood against the wood in question, but who said that his principal had no power to do so. This answer was communicated to *B.*, who took no further notice of the matter. The restriction on the authority of *B.*'s agent did not appear to have been brought to the knowledge of the commissioner. *B.* signed and sent to the commissioner a written consent to ratify the exchange of certain closes belonging to him, and designated in the consent by numbers. Among the closes thus designated was the wood in question, but the number by which it was referred to in the consent, and in a map and plan previously submitted to *B.*'s inspection, was not the same as that which it bore in *B.*'s private map of his own estate. A comparison of the two maps, or the reading of the plan sent with the commissioners' map, would have shewn *A.* that the wood in question was included in his consent. The commissioner allotted the lands to be exchanged, and, among others, included this wood, but did not give wood land for it. Possession of the exchanged lands, and of the wood among the rest (although the award of the commissioner had not been formally executed), was delivered by *B.*'s agent to *N.*, who immediately began to exercise acts of ownership over it. *B.*, some time afterwards, discovered what had been done, and brought ejectment against *N.* for the wood. *B.* filed his bill in Chancery to restrain *B.* from proceeding with the action, and to compel him to perfect the exchange; and *B.* filed his bill to prevent the commissioner from executing the award, alledging that the consent given to him had been signed in mistake. Held, that *N.* was entitled to an injunction as prayed by the bill, and that *B.* had no equity on which to ask for the interference of the Court in his favour.—*Beaufort (Duke) v. Neeld*, 248.

3. The Statute 6 & 7 W. 4, c. 115, gives to persons dissatisfied with anything that has been done under its provisions, an appeal to the Quarter Sessions. Semble, that this would not deprive a party aggrieved of his right to apply for

the interference of a Court of Equity, if he was in other respects entitled to that interference.—*Ib.*, *ib.*

4. *K.* holding lands under the use of *D.*, for a renewable term of twenty-one years, demised them, in 1787, to two persons for a like term with a *toties quoties* covenant for a renewal. These persons sold their interest in part of the lands, and divided the rest equally among them. On the death of one, his share passed to his two sons, *A.* and *A. Lowry*; the share of the other was sold to *P.* The two *Lowrys* obtained a renewal of the lease of all the lands to themselves in 1822, without *P.*'s knowledge, and then mortgaged them to *M.*, and obtained a judgment in ejectment against *P.*, who thereupon filed a bill against them and *M.*, and obtained, in 1826, a decree for an account and reconveyance of his part on payment of his proportion of the renewal fines and costs. *W.*, who had been the attorney of the *Lowrys* in all these matters, obtained an assignment of their interest in 1829. *P.* did not make up the decree of 1826, but made several payments to *W.* in respect of the renewal fines and costs, and urged him to reconvey to him his part of the lands and grant a renewal; but being in distress, he signed an agreement to surrender his lands to *W.*, and take part of them as his tenant. Held, upon a bill filed by *P.*, in 1842, that he was entitled to the benefits of the decree of 1826 against *W.*; that the accounts thereby directed ought to be then taken; that the agreement signed by *P.* to surrender was without consideration, and void; and that he was entitled to the value of his lands while they were in the possession of *W.*, and to a reconveyance and renewal upon payment of the balance found due from him.—*Wallace v. Patton*, 491.

EVIDENCE. See PEERAGE, TITHES.

1. A decretal order in Chancery, reciting the substance of the bill and answer, is admissible on proof of pedigree, to establish the identity of parties to the suit. But an answer alone, though sworn but not filed, is not admissible.—*Wharton Peerage*, 295.
2. *Scotch* wills, registered in the Court of Session, are retained there, and if it is necessary to prove any such wills in *England*, a certified copy is given out, and is admitted to probate in the *English Ecclesiastical Courts*. The Lords' Committees for privileges will not, on claims of *Peerage*, receive such copy, unless it is shewn that the original will cannot be produced.—*Ib.*, *ib.*

3. In a *quare impedit*, where the Bishop of *Derry* claimed the right of patronage of a living in the county of *Londonderry*, which was within the diocese of *Derry*, a surrender made by a former bishop to the Crown, of all the livings in that county, was tendered in evidence. This surrender was coupled with a grant by the Crown, dated two days afterwards, of the livings which had been so surrendered. Taken together, these documents were held to be admissible in evidence ; and as the grant recited that all the livings in the county had anciently belonged to the see, such evidence was, for the purpose of proving the title of the bishop, received as an admission by the Crown of that fact. The value of such evidence was still open to dispute. Before the date of the grant, the Crown had entered into articles of agreement with persons now represented by the Governor and Assistants of the *Irish Society* to grant to them the livings in the county, of which the living in question was named as one. Held, that this agreement did not prevent the grant from being receivable in evidence, however its value might be thereby affected.—*The Irish Society v. The Bishop of Raphoe*, 641.
4. Two letters from the Crown to two successive bishops of *Derry*, directing them to perform the covenants and directions contained in the grant, were tendered in evidence as recognitions by the Crown of its previous grant. Held, that they were admissible for this purpose.—*Ib.*, *id.*
5. Entries in the books, kept at the First Fruits' Office, are admissible to shew the fact of a collation to a living made by the bishop at a particular time.—*Ib.*, *id.*
6. Returns made by the bishop in obedience to writs from the Exchequer, requiring him to state the vacancies of and presentations and collations to the livings in his diocese, are admissible in evidence as statements made by a public officer in the discharge of a public duty. *Ib.*, *id.*
7. Though such return may contain statements of a kind unusual in such documents, which statements were in favour of the right of the bishop who made them, they are nevertheless admissible, provided that the statements are within the scope of the enquiry in the writ.—*Ib.*, *id.*
8. An original collation from the registry of the bishopric, and appearing on the face of it to be *plino jure*, is admissible to show that the right claimed has in fact been exercised.—*Ib.*, *id.*
9. An objection was taken that certain documents tendered in

evidence were not admissible for a particular purpose. The Court decided that they were admissible. An exception was taken to this decision. Held, that if the documents were admissible on any ground, the exception could not be sustained.—*The Irish Society v. The Bishop of Derry*, 641.

10. The recitals of a private act of Parliament, passed to enable parties therein named to sell certain estates, and stating the relationship of those parties, are evidence of that relationship.—*Wharton Peerage*, 295.

EXCHANGE OF LANDS. See EQUITY 2.

The Statute 6 & 7 W. 4, c. 115, gives to persons dissatisfied with anything that has been done under its provisions an appeal to the Quarter Sessions. Semble, that this would not deprive a party aggrieved of his right to the interference of a Court of Equity.—*Beaufort (Duke) v. Neeld*, 248.

FACTORS.

A foreign owner of goods consigned them to a factor in London, to whom he indorsed the bill of lading in blank, and transmitted it, with instructions to receive and sell the goods. The factor received the goods, paid the freight and charges thereon, and entered them in his own name at the Custom House, by reason of which, and without the privity or express assent of the owner, he obtained a dock warrant, which he pledged for advances beyond the amount for which, as a factor, he had a lien on the goods. Held, that under these circumstances, he was not intrusted with the dock warrant within the meaning of the second section of the 6 Geo. 4, c. 94. There is a distinction between persons intrusted with goods, and with the documents mentioned in that act. An intrusting with the bill of lading, for the purpose of the sale of goods, is not an intrusting with the dock warrant which represents those goods, notwithstanding that the possession of the bill of lading enables the holder of it to obtain possession of the dock warrant.—*Hatfield v. Phillips*, 343.

FOREIGN JUDGMENT. See PLEADING 4.

FRAUD. See EQUITY.

FRAUDS, STATUTE OF. See AGREEMENT 1.

GLEBE.

1. The 3 & 4 W. 4, c. 37, s. 124, empowers the Lord Lieutenant and Privy Council in *Ireland* to "disappropriate, disunite, and divest any rectory, vicarage, tithes, or portions of tithes, and glebes, or part or parts thereof, from and out of any

archbishopric, bishopric, deanery, or archdeaconry, dignity, prebend, or canonry, and to unite every such rectory, vicarage, tithes, or portions of tithes, to the vicarages and perpetual or other curacies of such parishes respectively, so that each such rectory, vicarage, tithes, or portion of tithes, and glebes, or part or parts thereof, shall, with its respective vicarage, perpetual or other curacy, form a distinct parish or benefice. Held, that the Lord Lieutenant and Privy Council have authority to disappropriate any part or portion of the tithes of a rectory. That the word rectory in the statute must be applied in its widest legal sense, and therefore includes the glebe; and that an order of disappropriation of a rectory," made by the Lord Lieutenant and Privy Council, cannot be restricted to the tithe rent charge, unless on the face of the order of disappropriation such restriction is manifested.—*Wilson v. Loveland*, 677.

2. In an order of the Lord Lieutenant and Council, made under this act, there was a statement of the revenues of three rectories belonging to a cathedral treasurership. The order then went on to say, "There is a further income belonging to the said treasurership, arising from demised lands, amounting to the yearly sum of 80*l.* 6*s.* 1½*d.*" The glebe lands which were not in express terms mentioned in the order, did amount to nearly the sum thus stated. A small piece of land called the Treasurer's Garden made up the rest. After this statement of the revenues, the order went on to disappropriate "the rectories, together with the rectorial tithes thereunto belonging," in pursuance of the power given by the act, but said nothing about the glebe. Held, that the glebe lands were, under this order, disappropriated from the treasurership.—*Id.*, *ib.*

HUSBAND AND WIFE. See DIVORCE, PROPOSALS FOR MARRIAGE.

1. The rule of law, in *Scotland*, requiring the concurrence of the husband in his wife's deed, cannot be dispensed with by proof that he was absent abroad at the time of the execution of the deed, unless that absence is shewn to be more than merely temporary.—*Rennie v. Ritchie*, 204.
2. A testator in *Scotland* gave all his property to trustees; first, to pay his debts; secondly, to pay Mrs. R. (a married woman) so much of the annual proceeds as they might deem necessary for the support of her and family during her

life, declaring the same to be alimentary and exclusive of her husband, and not to be attachable, nor assignable, nor subject to any deeds or debts of her and her husband. The acting trustee, with consent of Mrs. R., assigned to her alimentary creditor the rents of the trust property; first, to pay debts affecting it; secondly, to pay part of the rents to Mrs. R. for aliment; thirdly, to apply the residue in payment of the debts due to the assignee. Held, that the assignment was void on three grounds, *viz.*: 1st. It was not competent to the trustee to substitute another person for himself in the trust, which was the effect of the assignment; 2d, the rule of law in *Scotland* requiring the concurrence of the husband in his wife's deed, could not be dispensed with by his absence abroad at the time for a temporary purpose only; 3d, the assignment was void, as it violated the express prohibition against alienation; and in this respect the law in *Scotland* is the same as in *England*.—*Rennie v. Ritchie*, 204.

3. Husband separated from his wife for many years without making any provision for her maintenance from his ample means: held not to be entitled to a divorce.—*Simmon's Case*, 339.

IMPERTINENCE. See PRACTICE I.

An information filed by the Attorney-General at the relation of *A.* and *B.*, praying for the Crown the benefit of a judgment in outlawry against *C.*, and that a deed executed by *C.*, conveying his property to trustees, might be set aside as fraudulent and void as against the Crown, contained short statements showing the interest of the relators, and that the

modus of 13*l.* 6*s.* 8*d.*, payable half-yearly; and they showed receipts for that payment under various descriptions, as "rent for the rectory," and "prescribed rent due to the rector," from the year 1637, with some interruptions; and also receipts for a payment of 8*s.* 9½*d.*, which was supposed to be a payment in respect of tenths due from the rector to the Crown: Held, by the Lords, affirming a decree for an account, that the case made by the appellants would not warrant the Court to direct an issue to try the existence of the alleged *modus*, the evidence against it being free from doubt. A landowner cannot, like a rector, insist on an issue as a right; but in doubtful cases it is granted.—*Cairns v. Raine*, 833.

JURISDICTION.

The statute 6 & 7 W. 4, c. 115, gives to persons dissatisfied with anything that has been done under its provisions, an appeal to the Quarter Sessions. This would not deprive a party aggrieved of his right to apply for the interference of a Court of Equity, if he was in other respects entitled to that interference.—*The Duke of Beaufort v. Neeld*, 248.

LANDOWNER. *See* TITHES.

LAW AGENT. *See* ATTORNEY.

LEASE.

By lease made in 1719, the lessor demised for three lives, renewable for ever, all that part of the townland of B., containing 509 acres arable, meadow, and pasture, bounded on the south by D., on the north and east with L. N., and on the west with T.'s and W.'s land, with all rights thereto belonging, excepting and reserving all mines, quarries of stone, and coal, and all royalties, and all timber above and underground. There were several renewals of the lease in the same terms as to the contents and boundaries of the demised premises. Held, by the Lords affirming judgments of the Courts in *Ireland*, that 400 acres of bog and land reclaimed from bog, which were situated within the ambit of the specified boundaries, passed under the lease and the renewals thereof, in addition to the 509 acres arable, meadow, and pasture.—*Jack, lessee of Dawson v. M'Intyre*, 151.

LEGACY DUTY.

Personal property having no *situs* of its own, follows the domicile of its owner. The law of the domicile of a testator or intestate decides whether his personal property is liable to legacy duty. A British born subject died, domiciled in a

British Colony. At the time of his death he was possessed of personal property locally situate in *Scotland*. Probate of his will was taken out in *Scotland* for the purpose of there administering this property: and out of the fund thus obtained by the executor, legacies were paid to legatees residing in *Scotland*. Held, reversing a judgment of the Court of Exchequer in *Scotland*, that legacy duty was not payable in respect of these legacies.—*Thomson v. The Advocate-General*, 1.

MARRIAGE, PROPOSALS FOR. See **HUSBAND AND WIFE.**

A representation made by one party for the purpose of influencing the conduct of another, and acted on by the latter, will in general be sufficient to entitle him to the assistance of a Court of Equity, for the purpose of realizing such representation. And so in proposals of marriage, if the parent, or his agent, deliberately holds out inducements to the suitor to celebrate the marriage, and he consents and celebrates it, believing it was intended that he should have the benefits so held out to him, a Court of Equity will give effect to the proposals. Proposals of marriage written by the lady's brothers, acting by her father's authority, stated that "Mr. J. P. T. (the father) also intends to leave a further sum of 10,000*l.* in his will to Miss T., to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father. These are the bases of the arrangement, subject, of course, to revision; but they will be sufficient for Baron B. to act upon." Baron B., upon receiving the proposals, provided a jointure as required by them for his intended wife, and then married her. In the settlement afterwards executed, there was no mention of this 10,000*l.*; and it was not left by J. P. T. in his will:—Held, that his estate was liable to the payment of the 10,000*l.*, with interest from the end of one year after his death. Semble, that a letter written and signed by the father, after the marriage of his daughter, admitting the terms of the written proposals, which were not signed, was a recognition of them as his agreement sufficiently signed by him within the Statute of Frauds.—*Hammersly v. De Biel*, 46.

MISTAKE. See **PRINCIPAL AND AGENT.**

MODUS. See **TITHES.**

NEGLIGENCE. See **ATTORNEY.**

NOTICE. See **ASSIGNMENT.**

OFFICE. See QUO WARRANTO.
 OPTION. See REAL AND PERSONAL ESTATE.
 OUTLAWRY. See INFORMATION, PRACTICE.
 PARTNERSHIP. See PAWNBROKER.
 PAWNBROKER.

Two persons entered into an agreement to be partners in the business of pawnbrokers, to be carried on under the firm of one of them, whose name alone was painted over the door of the business premises, the license also was taken out, and the tickets and notes to the customers were issued in his sole name, while the other partner (carrying on another business) attended annually to inspect the books of the firm, and drew a per centage on his share of the profits on the capital. Held, that the agreement was for a secret partnership, and was illegal, and therefore void, as being contrary to the policy and prohibitions of the Statute 39 & 40 G. 3, c. 99.—*Gordon v. Howden*, 237.

PEERAGE.

1. It appeared by the Parliamentary pawns of 36 H. 8, and 1 Edw. 6, that a writ had been directed to "*Thomas, Lord Wharton*," for each of these Parliaments; but there was no evidence of his sitting in either of them, or of the writ itself. The Journals of the House of Lords shewed, that he was summoned to, and sat in the Parliament of the 2d of Edw. 6., and subsequent Parliaments. Creation of baronies by patent was not then unusual; but no patent or record or other trace of a patent, creating the barony of *Wharton* could be found. Held, that the said barony was created by writ and sitting in the 2d of Edw. 6., and was descendible to heirs general (of the body).—*Wharton Peerage*, 295.
2. A decretal order in Chancery, reciting the substance of the bill and answer, is admissible, on proof of pedigree, to establish the identity of parties to the suit. But an answer alone, though sworn, if not filed, is not admissible. *Scotch* wills, registered in the Court of Session, are retained there, and if it is necessary to prove any such wills in *England*, a certified copy is given out, and is admitted to probate in the English Ecclesiastical Courts. The Lords' Committee for privileges, will not, on claims of peerage, receive such copy, unless it is shewn that the original will cannot be produced.—*Ib.*, *id.*
3. If a judgment of outlawry stands in the way of a claim to a

barony in abeyance, although it is clearly erroneous, the Committee for Privileges cannot overlook or reverse it, but the claimant must apply to the proper tribunal for its reversal, and produce the judgment of reversal to the Committee.—*Ib.*, *id.*

PERSONAL PROPERTY. See **REALTY AND PERSONALTY, WILL.**

1. Personal property having no *situs* of its own, follows the domicile of its owner. The law of the domicile of a testator or intestate decides whether his personal property is liable to legacy. *A.*, a British born subject, died, domiciled in a British colony. At the time of his death he was possessed of personal property locally situate in *Scotland*. Probate of his will was taken out in *Scotland* for the purpose of there administering this property: and out of the fund thus obtained by the executor, legacies were paid to legatees residing in *Scotland*. Held, reversing a judgment of the Court of Exchequer in *Scotland*, that legacy duty was not payable in respect of these legacies.—*Thomson v. The Advocate General*, 1.
2. Semble, that the rule in *Wild's* case (6 Rep. 17), that "if *A.* devises his lands to *B.*, and to his children or issues, and he hath not any issue at the time of the devise, the same is an estate tail," is applicable to personalty.—*Stokes v. Heron*, 161.

PLEADING.

1. An information filed by the Attorney General at the relation of *A.* and *B.*, praying for the Crown the benefit of a judgment in outlawry against *C.*, and that a deed executed by *C.*, conveying his property to trustees might be set aside as fraudulent and void as against the Crown, contained short statements showing the interest of the relators, and alleging that the motives for the deed were to defraud *C.'s* creditors. Held that these statements were not impertinent. Exceptions for impertinence cannot be sustained, unless it appears clearly that the statements excepted to cannot be material at the hearing of the cause. Although it is not necessary that a relator in an information should have an interest in the subject of the suit, yet a statement showing his interest is not impertinent, as in the event of the suit failing, the costs may be more easily apportioned.—*Richard v. The Attorney General*, 30.

2. A declaration, or a summons against an attorney or a law agent, must charge gross ignorance or gross negligence, or must, at least, contain allegations of fact, from which the inference is inevitable that the defendant has been guilty of one or the other. The law as to both these matters is the same in *England* and in *Scotland*.—*Purves v. Landell*.
3. If a surety intends to rely upon any fact for his defence, as showing that there was a previous agreement between the banker and the customer to deal with the credit obtained by the customer through the surety in a particular manner, to which, if he had known it, he should not have consented to become surety, he must bring such a defence before the Court by putting it on the record.—*Hamilton v. Watson*, 109.
4. Judgment was given by competent tribunals in *France* against *A.*, in an action brought by him against persons with whom he had been connected in a loan transaction, for the purpose of obtaining from them an account, and payment of his share of the profits in the loan. He thereupon filed a bill in the Court of Chancery against some of the same persons, and for the same purposes, charging that the said judgment was contrary to justice, and was not final; and also that, subsequently to the date of the said judgment, further profits accrued to the defendants from the said loan, and claiming a right to a share of them. Held, that a plea of the foreign proceedings and judgment, setting them forth in substance and effect, filed by the defendants to the bill, supported by averments that the matters in issue in the foreign tribunals were the same as the matters put in issue by the bill, covered the whole of the matters comprised in the bill, and was a sufficient answer thereto. In pleading a foreign judgment it is not necessary to set forth the proceedings and judgment at length.—*Ricardo v. Garcias*, 368.
5. A declaration in trespass stated a breaking and entering, damaging the doors, hinges, and locks; spoiling the grass and fruit trees; and exposing the plaintiff's goods to sale on his premises. By means of which, &c., the plaintiff was not only disturbed in the possession of his house, but prevented from carrying on his business, and deprived of the enjoyment of his goods. The defendant pleaded that, before the action brought, the plaintiff became a bankrupt. On general demurrer, it was held (affirming the judgment of the Court below), that as there were some causes of action

included in the declaration which would not pass to assignees, the plea, which embraced the whole, and did select any particular portion of the declaration, was insufficient, and bad.—*Rogers v. Spence*, 700.

PRACTICE.

1. Exceptions for impertinence cannot be maintained, unless appears, clearly, that the statements excepted to cannot be material at the hearing of the cause. — *Richards v. Solicitor-General*, 30.
2. The House may, in its discretion, allow a document to be referred to in argument, although it has not been printed; the papers laid before the House, according to the direction of the Standing Order, No. 181 (Feb. 24, 1813).—*Balfour v. Duke v. Neeld*, 249.
3. If a judgment of outlawry stand in the way of a claim to a barony in abeyance, although it is clearly erroneous, the committee of privileges cannot overlook it or reverse it; the claimant must apply to the proper tribunal for its reversal, and produce the judgment of reversal to the committee.—*The Wharton Peerage*, 295.
4. Delay in bringing in a bill for a divorce may be accounted for by circumstances.—*Heaviside's Case*, 333.
5. The husband's attendance at the bar, on the second reading of his bill for a divorce, in compliance with the Standing Order, No. 142, may be dispensed with, on petition of counsel, showing reasonable grounds for his non-attendance.—*Shuldham's Case*, 363.
6. A defendant who, by a mistake in practice, allows an account to be taken against him without objection, is

scribed. One of these is the written consent of the owners of the lands intended to be exchanged. The landowners of a parish determined to carry this act into execution, and appointed a commissioner for that purpose. *B.*, one of the landowners, authorised his agent to attend for him at the meetings held for the purpose of carrying the act into execution, but desired him not to exchange a particular wood except for woodland. *N.*'s lands were to be exchanged against those of *B.*, and this restriction was communicated to *N.*'s agent, who being asked to exchange another wood against the wood in question, said that his principal had no power to do so. This answer was communicated to *B.*, who took no further notice of the matter. The restriction on the authority of *B.*'s agent, did not appear to have been brought to the knowledge of the commissioner. The commissioner prepared, and *B.* signed a written consent to ratify the exchange of certain closes belonging to him, and designated in the consent by numbers. Among the closes thus designated was the wood in question; but the number by which it was referred to in the consent, and in a map and plan previously submitted to *B.*'s inspection was not the same as that which it bore in *B.*'s private map of his own estate. A comparison of the two maps, or the reading of the plan sent with the commissioner's map, would have shown *B.* that the wood in question was included in the consent. The commissioner allotted the lands to be exchanged, and, among them, included this wood, but did not give woodland for it. Possession of the exchanged lands, and of this wood (although the award of the commissioner had not been formally executed), was delivered by *B.*'s agent to *N.*, who immediately began to exercise acts of ownership over it. *B.*, some time afterwards, discovered what had been done, and brought ejectment against *N.* for the wood. *N.* filed his bill in Chancery to restrain *B.* from proceeding with the action, and to compel him to perfect the exchange; and *B.* filed his bill to prevent the commissioner from executing the award, alleging that the consent given to him had been signed in mistake. Held, that *N.* was entitled to an injunction, as prayed by his bill, and that *B.* had no equity on which to ask for the interference of the Court in his favour. *Beaufort, Duke v. Neeld*, 248.

PRIORITY. See ASSIGNMENT.

QUARE IMPEDIT. See **EVIDENCE.****QUO WARRANTO.**

1. A proceeding by information in the nature of a *quo warranto* will lie for usurping any office, whether created by charter of the Crown alone, or by the Crown with the consent of Parliament, provided the office is of a public nature and a substantive office, and not merely the function or employment of a deputy or servant, held at the will and pleasure of others.—*Darley v. The Queen*, 520.
2. The office of treasurer of the public money of the county of the city of *Dublin* is an office for which an information in the nature of *quo warranto* will lie.—*Ib.*, *id.*

RAILWAY ACT.

1. Notices given and plans and sections of an intended railway deposited, in pursuance of the standing orders of the Houses of Parliament, previous to an application for an act, are not to be regarded in construing that act afterwards, unless they are incorporated therewith.—*North British Railway Company v. Tod*, 722.
2. A vertical deviation from the level of a railway, not exceeding five feet, calculated with reference to the *datum* line shewn in the plans and sections deposited in pursuance of the standing orders of the Houses of Parliament, is within the powers of deviation conferred by the Railway Clauses Consolidation Act for *Scotland* (8 & 9 Vict., c. 33, s. 11), although the deviation may exceed five feet, calculated with reference to the surface line shewn on the said plans and sections.—*Ib.*, *id.*

REALTY AND PERSONALTY. See **PERSONAL PROPERTY, WILL.**

1. Where money is directed to be vested in land or other security, but the conversion has not, in fact, taken place until the whole interest, whether in land or money, has become vested absolutely in one person, any act of his, indicating an option in which character to take or dispose of it, will determine the succession as between his real and personal representatives.—*Cookson v. Cookson*, 121.
2. A testator gave his residuary estate to his wife, and appointed her his executrix, with the tuition of his younger children, and to provide for them with regard to their fortunes; and he advised her thus:—"As to my son *John*, I would have 250*l.* a-year paid him until a sum of 10,000*l.* can be invested in land, or some other securities, which is to

be invested in trustees, for his use, as to the interest of such money or produce of such lands, for his natural life ; and if he marries with consent, &c., that he may make such settlement on such wife, &c., as you may judge proper, and that the remainder may go to such child or children he may have lawfully begotten ; but in failure of these, to my eldest son *Isaac* and his heirs for ever." The sum of 10,000*l.* was vested partly in personal securities, and partly on mortgage of real estate ; and on the death of *John* without any child, his widow, being entitled to the interest for life, and *Isaac*, entitled to the principal on her death, by their acts indicated their intention to take the fund as money. *Isaac* died intestate. Held, that even if the fund had been impressed by the will with the character of real estate—which was doubtful—it was re-converted into personalty by the subsequent acts of the party absolutely entitled, and therefore it belonged to the next of kin of *Isaac*, and not to his heir.—*Ib., id.*

3. The absolute owner of land, for the purpose of better using that land, erected upon and affixed to the freehold certain machinery :—Held, that in the absence of any disposition by him of this machinery, it would go to the heir as part of the real estate. If the *corpus* of such machinery belongs to the heir, all that belongs to that machinery, although more or less capable of being detached from it, and more or less capable of being used in such detached state, must be considered as attached to the freehold. No distinction arises in the application of the rule, from the circumstance that the land did not descend to but was purchased by such owner.—*Fisher v. Dixon*, 312.

RECTORY.

1. The 3 & 4 W. 4, c. 37, § 124, empowers the Lord Lieutenant and Privy Council in *Ireland*, to "disappropriate, disunite, and divest any rectory, vicarage, tithes, or portions of tithes, and glebes, or part or parts thereof, from and out of any archbishopric, bishopric, deanery, or archdeaconry, dignity, prebend, or canonry, and to unite every such rectory, vicarage, tithes, or portions of tithes to the vicarages and perpetual or other curacies of such parishes respectively, so that each such rectory, vicarage, tithes, or portion of tithes, and glebes, or part or parts thereof, shall, with its respective vicarage, perpetual or other curacy, form a dis-

tinct parish or benefice." Held, that the Lord Lieutenant and Privy Council have authority to disappropriate any part or portion of the tithes of a rectory;—that the word rectory in the statute must be applied in its widest legal sense, and therefore included the glebe; and that an order of disappropriation of "the rectory," made by the Lord Lieutenant and Privy Council, could not be restricted to the tithe rent charge, unless on the face of the order of disappropriation such restriction was manifested.—*Wilson v. Loveland*, 677.

2. In an order of the Lord Lieutenant and Council, made under this act, there was a statement of the revenues of three rectories belonging to a cathedral treasurership. The order then went on to say, "There is a further income belonging to the said treasurership, arising from demised lands, amounting to the yearly sum of 80*l.* 6*s.* 1½*d.*" The glebe lands which were not in express terms mentioned in the order did amount to nearly the sum thus stated. A small piece of land called the Treasurer's Garden made up the rest. After this statement of the revenues, the order went on to disappropriate the "rectories, together with the rectorial tithes thereunto belonging," in pursuance of the power given by the act, but said nothing about the glebe:—Held, that the glebe lands were, under this order, disappropriated from the treasurership.—*Id.*, *ib.*

REGISTRATION. See ANNUITY.

RELATOR. See INFORMATION.

RENEWALS OF LEASES. See EQUITY.

SCOTLAND. See LEGACY DUTY, TRUSTS AND TRUSTEES.

The law as to actions against attorneys or law agents for negligence in the management of causes is the same in *England* and in *Scotland*.—*Purves v. Landell*, 91.

STATUTES.

9 Geo. 2, c. 5.—*Boyle v. Ferrall*, 740.

32 Hen. 8, c. 34.—*Id.* *ib.*

39 Eliz. c. 5.—*Mayor of Newcastle v. The Att. Gen.*, 402.

6 & 7 W. 4, c. 115.—*Beaufort v. Neeld*, 248.

3 & 4 Vict., c. 31.—*Id.*, *ib.*

6 Geo. 4, c. 94.—*Hatfield v. Phillips*, 343.

3 & 4 W. 4, c. 37.—*Wilson v. Loveland*, 677.

39 & 40 Geo. 3, c. 99.—*Gordon v. Howden*, 237.

6 Geo. 4, c. 16.—*Rogers v. Spence*, 700.

8 & 9 Vict., c. 33.—*North British Railway Co. v. Tod*, 722.

SURETY.

A surety is not of necessity entitled to receive from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and that party. If he requires to know any particular matter, of which the party about to receive the security is informed, he must make it the subject of a distinct inquiry. An obligation to a banker by a third party to be responsible for a cash credit to be given to one of the banker's customers, is not avoided by the fact, that, immediately after the execution of the obligation, the cash credit is employed to pay off an old debt due to the banker. If the surety intends to rely upon such a fact for his defence, as showing that there was a previous agreement between the banker and the customer to deal with the credit in a particular manner, to which, had he known it, he should not have consented, he must bring such a defence before the Court by putting it on the record. — *Hamilton v. Watson*, 109.

SURPLUS. See DEED OF GIFT.

TITHES. See GLEBE.

1. To a bill by the rector for an account of tithes, against the owner and occupiers of land in the parish, they set up a *modus* of 13*l.* 6*s.* 8*d.* payable half-yearly; and they showed receipts for that payment under various descriptions, such as "rent for the rectory," and "prescribed rent due to the rector," from the year 1637, with some interruptions; and also receipts for a payment of 8*s.* 9½*d.*, which was supposed to be a payment in respect of tenths due from the rector to the Crown: Held, by the Lords, affirming a decree for an account, that the case made by the appellants would not warrant the Court to direct an issue to try the existence of the alleged *modus*, the evidence against it being free from doubt.—*Cairns v. Raine*, 833.
2. A landowner cannot, like a rector, insist on an issue as a right; but in doubtful cases it is granted.—*Id.*, *ib.*

TREASURER OF A CORPORATION. See CORPORATION.

TRESPASS.

A declaration in trespass stated a breaking and entering, damaging the doors, hinges, and locks; spoiling the grass and fruit trees; and exposing the plaintiff's goods to sale on his premises; by means of which, &c., the plaintiff was not only disturbed in the possession of his house, but pre-

vented from carrying on his business, and deprived of the enjoyment of his goods. The defendant pleaded that, before the action brought, the plaintiff became a bankrupt. Held, on general demurrer (affirming the judgment of the Court below), that as there were some causes of action included in the declaration which would not pass to the assignees, the plea which embraced the whole, and was not addressed to any particular of the declaration, was insufficient, and bad.—*Rogers v. Spence*, 700.

TRUSTS AND TRUSTEES.

A testator in *Scotland* gave all his property to trustees : first, to pay his debts ; secondly, to pay Mrs. R. (a married woman) so much of the annual proceeds as they might deem necessary for the support of her and family during her life, declaring the same to be alimentary and exclusive of her husband, and not to be attachable, nor assignable, nor subject to any deeds or debts of her or her husband. The acting trustee, with consent of Mrs. R., assigned to her alimentary creditor the rents of the trust property ; first, to pay any debts affecting it ; secondly, to pay part of the rents to Mrs. R. for aliment ; thirdly, to apply the residue in payment of the debts due to the assignee. Held, that the assignment was void ; because, first, it was not competent to the trustee to substitute another person for himself in the trust, which was the effect of the assignment ; and secondly, because it violated the express prohibition against alienation. And in this respect the law in *Scotland* is the same as in *England*.—*Rennie v. Ritchie*, 204.

2. In an agreement between King *James I.* and the City of *London*, in 1609, for a grant by the King of lands in *Ireland*, to be planted and colonized by the city ; it was stipulated that 20,000*l.* should be advanced, to be expended on the undertaking. The City compulsorily levied that and other sums for the same purpose upon the incorporated companies of *London*. The King afterwards granted a charter creating a corporation (the *Irish Society*), the members thereof to be from time to time appointed by the City for the management of the plantation, and to whom the lands were thereby granted for ever. The greater part of the lands was afterwards divided in severalty between the companies in the proportion of their contributions to the sums levied on them ; but the town lands, ferries, and fisheries, were retained by

the *Irish Society*, who, after applying part of the rents and profits towards the building of churches, schools, and other public purposes beneficial to the plantation, divided the surplus among the companies. One of these filed a bill against the Society and other parties, charging the Society, as trustee for the companies, with breaches of trust, in applying among their own members large sums in gifts, and in payments of travelling and other expenses, and calling on them for an account. Held, that the *Irish Society* was constituted trustee for permanent public purposes, and had a discretion in applying the funds arising from the property retained to these purposes: that though the Society was accountable to the Crown for any neglect of duty in such trust, and also to the City of *London* for misconduct in the management of the property, it was not accountable to the Companies.—*Skinnners' Company v. The Irish Society*, 425.

3. The Act 39 Eliz., c. 5, enables "all and every person and persons" to found hospitals for the poor, and to incorporate them. A municipal corporation is included to "every person and persons," and may exercise the powers given by the act. A voluntary conveyance of real estates to a charity is not defeated by a subsequent conveyance for valuable consideration. Real estates conveyed to and vested in a hospital founded under the Act 39 Eliz., c. 5, cannot be alienated by the hospital, nor can it confirm an alienation of them by the founders. A municipal corporation voluntarily founded a hospital, under the 39 Eliz., c. 5, and purchased real estates, and caused them to be conveyed to the hospital, but which were kept under the control and management of the founders, who afterwards sold and conveyed them for valuable consideration, granting the purchasers covenants for title and indemnity against the claims of the hospital. The founders applied the money produced by the sale, together with other monies of their own, in the purchase of an estate at *W.*, and they paid annually to the hospital more than the rents and profits of the sold estates. The hospital at first concurred in that arrangement, and acquiesced in it for 120 years, after which the Attorney General and the hospital by information and bill claimed a portion of the estate at *W.*, bearing the same proportion to the whole estate, that the produce of the sale of the hospital's estates bore to the whole purchase money of the estate at *W.* Held, 1st., that

the estates conveyed to the hospital were well vested in it, and could not be sold without an act of Parliament, and therefore a decree directing the hospital to confirm the sale was in that respect erroneous; 2d, that if the hospital's concurrence and long acquiescence in the arrangement for the sale of its estates were held to bar its right to recover them, or a commensurate portion of the estate at *W.*, the Attorney General's right to protect the charity still existed.

—*Mayor of Newcastle v. The Attorney General*, 402.

4. If charity trustees are guilty of a breach of trust, the person thereby injured has no right to be indemnified by damages out of the trust fund. The law is the same in this respect both in *England* and *Scotland*. — *Feoffees of Heriot's Hospital v. Ross*, 507.
5. In searching for the intention of a donor, which is the standard to govern the construction of a deed of gift, the facts, first, that the gift is subject to the condition of making certain payments to others,—secondly, that forfeiture will be incurred by non-performance of that condition,—and thirdly, that the donee may be subjected to loss by the performance of that condition are sufficient to raise the presumption that in case of the increase of the fund, the donor intended to give to the donee the benefit of that increase. A donor granted to the Principal and Professors of a college, certain lauds, "upon the conditions hereinafter specified," to maintain three bursars, "according to the manner, measure, and quality, and as the rest of the bursars of philosophy, presently in the said college, already founded, are educated and entertained," and imposed as a condition (the penalty for the breach of which was forfeiture), that the Principal and Professors should admit to the bursarships the presentees of the donor and his family: Held, reversing the judgment of the Court of Session) that this was a grant upon condition, and not a mere trust, and that the Principal and Professors were entitled, after satisfying the conditions of the deed of gift, to appropriate to themselves any surplus arising from the lands thus given.—*Jack v. Burnett*, 812.

WILL.

1. A testator gave his residuary estate to his wife, and appointed her his executrix, to provide for his younger children. And as to his son *John*, he "would have 250*l.* a-year paid him 'until a sum of 10,000*l.* can be invested in land,

or some other securities, which is to be invested in trustees, for his use, as to the interest of such money or produce of such lands, for his natural life; and if he marries, &c., that he may make such settlement on such wife, &c., as you judge proper, and that the remainder may go to such child or children he may have lawfully begotten; but in failure of these, to my eldest son *Isaac* and his heirs for ever." The sum of 10,000*l.* was vested in personal securities, and partly on mortgage of real estate; and on the death of *John* without any child, his widow, being entitled to the interest for life, and *Isaac* entitled absolutely on her death, by their acts indicated their intention to take it as a money fund. *Isaac* survived the widow and died intestate. Held, that even if the fund had been impressed by the will with the character of real estate—which was doubtful—it was reconverted into personalty by the subsequent acts of the parties entitled, and therefore the next of kin of *Isaac*, and not his heir, were entitled.—*Cookson v. Cookson*, 121.

2. Where money is directed by will to be vested in land or other security, but the conversion has not in fact taken place until the whole interest, whether in land or money, has become vested absolutely in one person, any act of his indicating an option in which character to take or dispose of it, will determine the succession as between his real and personal representatives. *Ib.*, *id.*
3. A will disposing only of personalty contained these words:—"My will is, that whatever I die possessed of, or in any way entitled to, together with whatever property my wife may be any way entitled to, shall produce to my wife an annuity of 100*l.* per annum, to each of my daughters 100*l.* per annum for themselves and their children, and to my wife's mother an addition to any property she may possess, so as to make up to her during ~~her~~ *her* life an annuity of 100*l.* per annum; said annuities, after the decease of my wife and her mother, to be equally divided among my three children, *William*, *Mary*, and *Julia Louisa*; all the rest and residue of my property and possessions I give and bequeath to my son *William*." At the date of the will and of the testator's death, his daughters had no children:—Held, that all the annuities thus created were perpetual annuities. The testator's daughter, *M.*, died, and after her death he made a

codicil to his will, dividing her annuity between his two surviving children, but in other respects confirming the will. His wife's mother having died, he made a second codicil in these words:—"And in case my son *William* shall die without leaving issue male lawfully begotten, my will is that, after the decease of my wife and my daughter *J. L.*, my remaining property shall then be divided between" two relations named in the codicil, and their children:—Held, that these codicils did not alter the nature of the annuities given by the will to *Julia Louisa*.—*Stokes v. Heron*, 161.

4. Where a will clearly establishes a perpetual annuity, the estate in the annuity cannot be restricted by a codicil to a life estate; unless the expressions there used are clear and undoubted.—*Id.*, *ib.*
5. Semble, that the rule in *Wild's case* (6 Rep. 17), that "if *A.* devises his lands to *B.*, and to his children or issues, and he hath not any issue at the time of the devise, the same is an estate tail"—is applicable to personalty.—*Id.*, *ib.*
6. In the absence of any disposition of machinery erected upon and affixed to the freehold, it will go to the heir as part of the real estate.—*Fisher v. Dickson*, 312.
7. If the *corpus* of such machinery belongs to the heir, all that belongs to that machinery, although more or less capable of being detached from it, and more or less capable of being used in such detached state, must also be considered as belonging to the heir.—*Id.*, *ib.*
8. No distinction arises in the application of this rule, from the circumstance that the land did not descend to, but was purchased by the owner.—*Id.*, *ib.*

of the testator's son (father of *B.*), to take the profits of the same leasehold premises until one of them should attain the age of twenty-one, and then to convey the same to such heir male first attaining that age, his executors, administrators, and assigns. At the death of *B.*, the grandson, his son and heir, *A.* had attained the age of twenty-one, and entered into possession of the leasehold premises. Upon a bill filed against him by the next of kin of the testator: Held, that *A.* had not a good title to the leaseholds; that the bequest to the heir male of the grandson attaining twenty-one was void for remoteness; and, therefore, that the next of kin of the testator, at his death, became entitled to their distributive shares of the property on the death of the grandson.—*Viscount Dungannon v. Smith*, 546.







